TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]285

DORA E. ROOKER AND WILLIAM V. ROOKER, PLAINTIFFS IN ERROR,

vs.

FIDELITY TRUST COMPANY AND FIDELITY TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED FEBRUARY 28, 1922.

(28,740)

(28,740)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 785.

DORA E. ROOKER AND WILLIAM V. ROOKER, PLAINTIFFS IN ERROR,

vs.

FIDELITY TRUST COMPANY AND FIDELITY TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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a In the Supreme Court of the United States, at the October Term, 1921.

Law. No. —.

DORA E. ROOKER, WILLIAM V. ROOKER, Plaintiff- in Error,

vs.

FIDELITY TRUST COMPANY, in Its Corporate Capacity Proper; Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Defendants in Error.

Return of the Clerk of the Supreme Court of Indiana to the Writ of Error.

William Velpeau Rooker, Attorney for Plaintiffs in Error.
Ira W. Christian, Floyd G. Christian, Ralph H. Waltz, of counsel.

Costs of this transcript, three hundred and thirty —, $330.00, paid by Wm. V. Rooker, Atty.

1 STATE OF INDIANA:

In the Supreme Court.

Be it remembered That heretofore to wit: On the 18th day of June, 1919, the same being the 21st Judicial day of the May Term 1919, of said Supreme Court, Dora E. Rooker and William V. Rooker by their attorney, William V. Rooker, filed in the office of the Clerk of said Supreme Court of said State of Indiana, a transcript of the record, proceedings and judgment had in the Hamilton Circuit Court of said State of Indiana, in a cause wherein Dora E. Rooker and William V. Rooker were appellants, and Fidelity Trust Company in its Corporate Capacity Proper, Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker were appellees, together with assignments of errors by appellants and præcipe for notice, and are in the words and figures following, to wit:

2 *Praecipe for Notice of Appeal.*

In the Supreme Court of Indiana.

No. 23598.

WILLIAM V. ROOKER, DORA E. ROOKER, Appellants,

vs.

FIDELITY TRUST COMPANY, in Its Corporate Capacity Proper; Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Appellees.

Appeal from the Hamilton Circuit Court.

William V. Rooker and Dora E. Rooker, appellants in the cause above entitled, request the clerk of the Supreme Court of Indiana to issue notice of this appeal to be directed to the Sheriff for service in Marion County, Indiana, upon each of the following named persons as appellees, to wit: The Fidelity Trust Company in its corporate capacity proper; The Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, and to make said notice returnable as provided by law.

WILLIAM V. ROOKER,
Attorney for Appellants.

3 In the Supreme Court of Indiana.

No. 23598.

DORA E. ROOKER, WILLIAM V. ROOKER, Appellants,

vs.

FIDELITY TRUST COMPANY, in its Corporate Capacity Proper; Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Appellees.

Appeal from the Hamilton Circuit Court.

Joint Assignment of Error by Appellants Against the Appellees Jointly.

Dora E. Rooker and William V. Rooker, appellants, who were plaintiffs in the court below, for their joint assignment of errors herein against the above named appellees jointly, who were defendants in the court below, say that there is manifest error in the record, proceedings and judgment of the Hamilton Circuit Court of Indiana, being the court below from which this appeal is prosecuted, in each of the following several particulars, that is to say:

1. The court erred in overruling the plaintiffs' motions to strike out the second amended counter claim of the defendants, to which ruling of the court the plaintiffs at the time excepted.

2. The court erred in overruling the plaintiffs' demurrers
4 to the second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

3. The court erred in overruling the plaintiffs' motion to make more certain and specific the second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

4. The court erred in overruling the plaintiffs' demurrers to the supplemental second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

5. The court erred in overruling the motion of the plaintiffs for judgment on the special findings of facts to which ruling of the court the plaintiffs at the time excepted.

6. The court erred in each of the following numbered conclusions of law, to each of which conclusions of law severally and separately considered the plaintiffs at the time excepted, namely, the first, the second, the third, the fourth, the fifth and the sixth conclusions of law.

7. The court erred in overruling the plaintiffs' motions to modify the judgment to which ruling of the court the plaintiffs at the time excepted.

8. The court erred in overruling the plaintiffs' motions for new trial to which ruling of the court the plaintiffs at the time excepted.

Wherefore the appellants, who were plaintiffs in said cause in said court below, pray that the judgment of said Hamilton Circuit Court of Indiana, given and rendered in said cause, be in all things reversed and appellants pray for all proper relief.

WILLIAM VELPEAU ROOKER,
Attorney for Appellants.

5 In the Supreme Court of Indiana.

No. 23598.

DORA E. ROOKER, WILLIAM V. ROOKER, Appellants,

vs.

FIDELITY TRUST COMPANY, in its Corporate Capacity Proper; Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Appellees.

Appeal from the Hamilton Circuit Court.

Joint Assignment of Error by Appellants Against Each of the Appellees Severally and Separately.

Dora E. Rooker and William V. Rooker, appellants who were plaintiffs in the court below for their joint assignment of errors herein against each of the above named appellees severally and separately, who were defendants in the court below say that there is manifest error in the record, proceedings and judgment of the Hamilton Circuit Court of Indiana, being the court below from which this appeal is prosecuted in each of the following several particulars, that is to say:

1. The court erred in overruling the plaintiffs' motions to strike out the second amended counter claim of each of the defendants separately and severally considered, to which ruling of the court the plaintiffs each at the time excepted.

6 2. The court erred in overruling the plaintiffs' demurrers to the second amended counter claim of each of the defendants separately and severally considered, to which ruling of the court the plaintiffs each at the time excepted.

3. The court erred in overruling the plaintiffs' motion to make more certain and specific the second amended counter claim of each of the defendants, to which ruling of the court the plaintiffs each at the time excepted.

4. The court erred in overruling the plaintiffs' demurrers to the supplemental second amended counter claim of each of the defendants, to which ruling of the court the plaintiffs each at the time excepted.

5. The court erred in overruling the motion of each of the plaintiffs for judgment on the special findings of fact to which ruling of the court each of the plaintiffs at the time excepted.

6. The court erred in each of the following numbered conclusions of law, to each of which conclusions of law severally and separately considered, each of the plaintiffs at the time excepted,

namely, the first, the second, the third, the fourth, the fifth and the sixth conclusions of law.

7. The court erred in overruling each of the plaintiffs' motions to modify the judgment to which ruling of the court each of the plaintiffs at the time excepted.

8. The court erred in overruling each of the plaintiffs' motions for new trial to which ruling of the court each of the plaintiffs at the time excepted.

Wherefore, each of the appellants, who were plaintiffs in said cause in said court below, pray that the judgment of said Hamilton Circuit Court of Indiana given and rendered in said court
7 be in all things reversed and each of appellants prays for all proper relief.

WILLIAM VELPEAU ROOKER,
Attorney for Appellants.

In the Supreme Court of Indiana.

No. 23598.

DORA E. ROOKER, WILLIAM V. ROOKER, Appellants,

vs.

FIDELITY TRUST COMPANY, in its Corporate Capacity Proper, Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Appellees.

Appeal from the Hamilton Circuit Court.

Separate and Several Assignments of Error by Each of the Appellants Against the Appellees Jointly.

Dora E. Rooker and William V. Rooker appellants who were plaintiffs in the court below, for their separate and several assignments of error, by each of the appellants, against the above named appellees jointly, who were defendants in the court below, say that there is manifest error in the record, proceedings and judgment of the Hamilton Circuit Court of Indiana, being the court below from which the appeal is prosecuted, in each of the following several particulars, that is to say:

1. The court erred in overruling the separate and several motions of the plaintiffs to strike out the second amended counter claim of the defendants, to which rulings of the court each of the
8 plaintiffs at the time severally and separately excepted.

2. The court erred in overruling the separate and several demurrers of the plaintiffs to the second amended counter claim of the defendants to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

3. The court erred in overruling the separate and several motions of the plaintiffs to make more certain and specific the second amended counter claim of the defendants, to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

4. The court erred in overruling the separate and several demurrers of the plaintiffs to the supplemental second amended counter claim of the defendants, to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

5. The court erred in overruling the separate and several motions of the plaintiffs for judgment on the special findings of facts against the defendants, to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

6. The court erred in favor of the defendants in each of the following numbered conclusions of law to each of which conclusions of law severally and separately considered as to defendants each of the plaintiffs at the time excepted, namely: The first, the second, the third, the fourth, the fifth, and the sixth conclusions of law.

7. The court erred in favor of the defendants in overruling the separate and several motions of each of the plaintiffs to modify the judgment to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

9 8. The court erred in favor of the defendants in overruling the separate and several motions of each of the plaintiffs for a new trial to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

Wherefore each of the appellants who were plaintiffs in said cause in said court below, pray that, as to the defendants, the judgment of said Hamilton Circuit Court of Indiana the judgment given and rendered in said cause be as to the appellees, who were defendants below, in all things reversed and appellants each prays for all proper relief.

WILLIAM VELPEAU ROOKER,
Attorney for Appellants.

10 In the Supreme Court of Indiana.

No. 23598.

DORA E. ROOKER, WILLIAM V. ROOKER, Appellants,

vs.

FIDELITY TRUST COMPANY, in its Corporate Capacity Proper; Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Appellees.

Appeal from the Hamilton Circuit Court.

Separate and Several Assignments of Error by Each of the Appellants Against Each of the Appellees Separately and Severally.

Dora E. Rooker and William V. Rooker, appellants who were plaintiffs in the court below, for their separate and several assignments of error, by each of the appellants, against each of the above named appellees separately and severally, who were defendants in the court below say that there is manifest error in the record, proceedings and judgment of the Hamilton Circuit Court of Indiana, being the court below from which this appeal is prosecuted in each of the following several particulars, that is to say:

1. The court erred in overruling the separate and several motions of the plaintiffs to strike out the second amended counter claim of each of the defendants, to which rulings of the court each
11 of the plaintiffs at the time severally and separately excepted.

2. The court erred in overruling the separate and several demurrers of the plaintiffs to the second amended counter claim of each of the defendants, to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

3. The court erred in overruling the separate and several motions of the plaintiffs to make more certain and specific the second amended counter claim of each of the defendants, to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

4. The court erred in overruling the separate and several demurrers of the plaintiffs to the supplemental second amended counter claim of each of the defendants, to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

5. The court erred in overruling the separate and several motions of the plaintiffs for judgment on the special findings of facts against each of the defendants, to which rulings of the court each of the plaintiffs at the time severally and separately excepted.

6. The court erred in favor of each of the defendants in each of the following numbered conclusions of law to each of which conclu-

sions of law severally and separately considered as to each of the defendants, each of the plaintiffs at the time excepted, namely: The first, the second, the third, the fourth, the fifth and sixth conclusions of law.

7. The court erred in favor of each of the defendants in overruling the separate and several motions of each of the plaintiffs to modify the judgment, to which rulings of the court as to each of
12 the defendants, each of the plaintiffs at the time severally and separately excepted.

8. The court erred in favor of each of the defendants in overruling the separate and several motions of each of the plaintiffs for a new trial, to which rulings of the court as to each of the defendants, each of the plaintiffs at the time severally and separately excepted.

Wherefore each of the appellants who were plaintiffs in said cause in said court below, pray that, as to each of the defendants, the judgment of said Hamilton Circuit Court of Indiana the judgment given and rendered in said cause be, as to each of the appellees, who were defendants below, in all things reversed and appellants each prays for all proper relief.

WILLIAM VELPEAU ROOKER,
Attorney for Appellants.

13 Pleas and proceedings before the Honorable Meade Vestal, sole judge of the Hamilton Circuit Court, at a term of said court, held at the court house, in the city of Noblesville, commencing on the second Monday of January, 1913, in the case of—

No. 16338.

DORA E. ROOKER, WILLIAM V. ROOKER

vs.

FIDELITY TRUST COMPANY.

Be it remembered, that heretofore towit: On the 20th day of March, 1913, the Clerk of the Marion Circuit Court, filed in the office of the Clerk of the Hamilton Circuit Court, a transcript in the above entitled cause, which transcript reads as follows:

Be it remembered, that among the records of the Circuit Court of Marion County, Indiana are the following in the case of—

No. 21754.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY.

Be it further remembered, that heretofore towit: On the 30th day of October, 1912, the above named plaintiffs, by counsel, filed in the office of *of* the Clerk of said Court, a complaint against the said defendant, which complaint is as follows:

(Herewith transmitted.)

Summons issued to November 15th, 1912 (herewith transmitted).

And afterwards towit: On the 14th day of November, 1912, being the 10th Juridical day of the November Term, 1912 of said Court, before the Hon. Charles Remster, Judge thereof, the follow-
14 ing proceedings were had herein, viz:

"Comes now Henry Seyfreid and enters his appearance for the defendant, and on motion said defendant is ruled to answer by November, 23rd, 1912."

And afterwards towit: On the 23rd day of November, 1912 being the 18th Juridical day of the November Term, 1912, of said court, before the same Honorable Judge thereof, the following proceedings were had herein viz:

"Come the parties and the defendant files answer to the complaint in general denial, as follows:

(Herewith transmitted.)

And afterwards towit: On the 1st day of January, 1913, being the 27th Juridical day of the December Term, 1912, of said Court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

"Whereas a larger number of cases have been filed in the Marion Circuit Court during the present Term of said Court than can be tried and disposed of with expedition owing to the large number of cases pending in said Court, and in the opinion and judgment of the Judge of this court, an early disposition of the cases hereinafter designated by number in said — is required, it is therefore ordered by the Court that the cause numbered, as follows, towit: 21754 be, and the same is hereby transferred to, the Marion Superior Court, of Marion County, Indiana to be redocketed and disposed of as if originally filed with said Superior Court."

And afterwards towit: On the 12th day of March, 1913, being the 9th Juridical day of the March Term, 1913, of said Superior Court,

Room 1, before the Hon. Charles Orbison, Judge thereof, the following were had herein viz:

15 "Comes plaintiffs, by counsel and file their verified motion for a change of venue from the County, as follows:

(Herewith transmitted.)

And the Court now orders that the venue of this cause be changed to the Hamilton Circuit Court, and that Plaintiffs pay the costs of such change of venue within five days from this date."

STATE OF INDIANA,
County of Marion, ss:

No. 89456.

DORA ROOKER et al.

vs.

FIDELITY TRUST COMPANY.

I, John Rauch, Clerk of the Superior Court of Marion County, Indiana, *to* hereby certify that the above and foregoing transcript contains full true and correct copies of all the entries of proceedings had in the above entitled cause, as appears from the records in my office, and that the papers herewith transmitted are all the papers in said cause in my office.

I further certify that I have set out below a full, true and complete statement of the costs accrued in the above cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Indianapolis, this 18th day of March, 1913.

(Signed) JOHN RAUCH,
Clerk Marion Superior Court

(All pleadings enumerated above were afterward amended.)

And afterward towit: On the 24th day of March, 1913, same being the 61st Judicial day of the January Term, 1913 of the Hamilton Circuit Court, before the Hon. Meade Vestal sole Judge of
16 said Court, the following proceedings were had in said cause towit:

"Comes now the defendant Fidelity Trust Company, and files its Cross-complaint against the plaintiffs Dora E. Rooker and William V. Rooker, which said cross-complaint is in the words and figures following, (afterwards amended) and the Court now orders the Clerk of this Court to issue summons on said cross-complaint to the said Dora E. Rooker and William V. Rooker said summons to be returnable on the 7th day of April, 1913."

And afterwards on the 19th day of April, 1913, being the 12th judicial day of the April Term, 1913 of said Court, the following proceedings were had viz:

"Comes now the defendant and moves the Court for and order requiring the plaintiffs to file answer to the Defendant's cross-complaint, said motion is sustained by the Court and said plaintiffs are ruled to answer said defendant's cross-complaint on or before May 1st, 1913."

And afterwards, on the 30th day of April, 1913, being the 21st judicial day of the April Term 1913, of said Court the following proceedings were had, viz:

"Comes now the plaintiffs and file motion for change of venue from the Judge, which motion reads as follows (H. I.). Said motion is now sustained by the Court, and by agreement of the parties the Court now appoints James M. Purvis, Judge of the Tipton Circuit Court, Special Judge to try this cause."

And afterwards on the 3rd day of May, 1913, being the 24th judicial day of said Term of said Court, the following proceedings were had viz:

"Comes now James M. Purvis Judge of the Tipton Circuit
17 Court, and accepts his appointment and qualifies by taking and subscribing to an oath for the faithful discharge of his duties as such Special Judge.

Comes now each of the Plaintiffs and file separate motion, requiring the defendant to make its cross-complaint more specific, which separate motions read as follows (H. I.)

And afterwards, on the 15th day of May, 1913, being the 34th judicial day of said term of said Court, the following proceedings were had, viz:

"Come now the parties, and the Court now overrules motion of the plaintiff Dora E. Rooker to require the defendant to make his cross-complaint more specific, to which ruling of the Court, the said plaintiff Dora E. Rooker, at the time, objects and excepts."

And afterwards, on the 31st day of May, 1913, being the 48th judicial day of said term of said court, the following proceedings were had, viz:

"Comes now each of the plaintiffs and file their separate motion to require the defendant to separate its cross-complaint into paragraphs so as to pleads items specifically which separate and several motions reads as follows, (H. I.) said motions are now overruled by the Court, to which ruling of the court, each of the plaintiffs separately and severally object and except.

The said plaintiffs now file their separate motion to require the defendants to paragraph its cross-complaint herein as to classes of

items as specified in its deed, which separate and several motions read as follows (H. I.) Said motions are overruled by the Court, to which ruling of the Court, each of the plaintiffs at the time separately object and except. And on motion of the defendant
18 the plaintiffs are now ruled to answer defendant's cross-complaint on or before June 7th, 1913."

And afterwards, on the 7th day of June, 1913, being the 54th judicial day of said Term of said Court, the following proceedings were had, viz:

"Comes now the plaintiffs herein, and separately move the Court to strike out the cross-complaint, which said motion is in the following words and figures to wit, (H. I.) and the court having seen and examined said motion now overrules the same, to which ruling the plaintiffs and each of them at the time, separately and severally excepts.

Come now the plaintiffs and separately *demurrers* to the cross-complaint herein, which said demur-er is in the following words and figures to wit: (H. I.)

And afterward, on the 17th day of June, 1913, being the 62nd judicial day of said term of said court, the following proceedings were had, viz:

"Come now the parties and the Court having heard the argument of counsel and being advised in the premises now overrules each of the separate demurrers of the plaintiffs' to the cross-complaint to which ruling of the court each of the plaintiff- at the time object- and excepts."

And afterwards, on the 10th day of July, 1913, being the 82nd judicial day of said term of said court, the following proceedings were had, viz:

"Comes now the defendant and moves the Court for an order requiring the plaintiffs to answer the cross-complaint. Said motion is now sustained by the Court and the plaintiff is ordered to file answer to cross-complaint of defendant, on or before the 19th
19 day of July, 1913."

And afterwards, on the 19th day of July, 1913, being the 90th judicial day of said term of said court, the following proceedings were had, viz:

"Comes now the plaintiffs and file their separate and several motions requiring the defendant to make its counterclaim more specific, which separate and several motions read as follows:" (H. I.)

After afterwards to wit: On the 13th day of October, 1913, being the 7th Judicial day of the October Term, 1913, of said Court, the following proceedings were had, to wit:

"Comes now the defendant, and on motion of defendant, plaintiff is ruled to answer the cross-complaint on or before October 20th, 1913."

And afterwards to wit: On the 20th day of October, 1913 being the 13th Judicial Day of said term of said Court, the following proceedings were had to wit:

Comes now the defendant the Fidelity Trust Company, and files herein its supplemental cross-complaint, which supplemental cross-complaint is in the words and figures following to wit: (H. I.) And the plaintiffs Dora E. Rooker and William V. Rooker now tender to the Court for filing their amended complaint, making new parties and defendant The Fidelity Trust Company objects to the filing of the amended complaint making new parties, but do not object to the filing of amended complaint, except as to making new parties.

And the Court now overruled objections of defendant Fidelity Trust Company to the filing of said amended complaint to which ruling of the Court, the defendant at the time excepts. And said plaintiff now files their amended complaint, which is in the words and figures following:

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16388.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY.

Amended Complaint.

Dora E. Rooker and William V. Rooker, her husband, for cause of action as by amended complaint against the defendant Fidelity Trust Company of Indianapolis, Indiana, James W. Lilly, and Frank D. Stalnaker doing business as partners in the firm name and style of Lilly & Stalnaker Illinois Surety Company: Balke & Krause Company, and Daniel I. Neher, says:

That on to wit: the 11th day of October, 1909, the plaintiff, Dora E. Rooker her said husband joining executed their certain warranty deed to the defendant Fidelity Trust Company wherein and whereby they conveyed to said Trust Company the following real estate in Marion County, in the State of Indiana to wit: The Southeast Quarter of the Northeast Quarter of Section 33, Township 17, North, range 4 East, also the Southwest Quarter of the Northwest Quarter of

Section 34, Township 17, North, Range 4 East, said tract containing in all eighty acres, more or less.

And also the following real estate in Hamilton County, in the State of Indiana, to wit: All of the West one-half of North half of section 18, Township 18 North, Range 5 East lying west of the Lake Erie & Western Railroad.

Also the Southwest Quarter of Section 7, Township 18, North, Range 5 East, Lying West of the Lake Erie Railroad and East of White River. Also the Southwest Quarter of Section 12,
21 Township 18, North, Range 4 East, lying South and East of White River.

Also all that part of Northeast Quarter of Section 13, Township 18, North, range 4 East, more particularly described as follows: Beginning at the Northeast corner of said Section and running thence West with said Section line 132 rods more or less to White River Thence Southerly along said stream to a point 39.95 rods South of the North line of said Section; thence East 65.80 rods; thence South, 73.15 rods; thence East 69.25 rods; thence North 115.20 rods to the place of beginning, said several tracts of land in Hamilton County containing in all 275 acres, more or less.

That said warranty deed was executed concurrently with a certain instrument of trust defining and limiting the interest and estate of said Fidelity Trust Company in and to said real estate, a copy of which trust agreement marked "exhibit" "A" is filed herewith.

That said real estate so conveyed was at the time of the reasonable value of one hundred thousand dollars; and that in and by said trust agreement said Fidelity Trust Company undertook and agreed to pay off certain indebtedness of said Dora E. Rooker arising out of, and incident to the making of certain improvements on said real estate; that said improvements had at that time been carried so far toward completion as that they could not then be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; that it then required at least six thousand dollars to complete said improvements and to pay off said indebtedness of said
22 Dora E. Rooker incurred by her out of the making of said improvements and in the completion and installation thereof; that in consideration of the premises and in consideration of the conveyance of said land to Fidelity Trust Company and in consideration of the promise of said Dora E. Rooker to pay certain rates, fees and charges named and specified in said trust agreement, the said Fidelity Trust Company promises and agreed thereafter to pay from time to time upon the written order and direction of said Dora E. Rooker six thousand dollars for and on account of the erection and construction of said dwelling house, outbuildings and improvements and the equipment and installment thereof and such other sum or sums of money than those above specified as might be necessary to perform or better promote the performance of said trust and to the end that such additional funds might be obtained said Fidelity Trust Company covenanted and agreed to obtain from

other bank or banks upon the promissory note of said Dora E. Rooker all such sums or sum of money whether within or in excess of the sum of six thousand dollars as might be necessary to the true and better and complete performance of said contract and to the successful maintenance of and care of said real estate and the business thereon conducted, and to that end it became necessary for said Fidelity Trust Company to protect and preserve the credit of said Dora E. Rooker at the Banks at which she did business, and to do every other act as might be necessary and proper to the complete performance of said contract that said Fidelity Trust Company further undertook to sell said real estate and close said trust within two years after the date of the execution of said instrument and in the particular manner stipulated and de-
23 scribed in paragraph four of said said Trust deed to which reference is hereby made for greater certainty.

That said Fidelity Trust Company in wrongful disregard of its duties in the premises and violation of the rights of the said Dora E. Rooker failed and refuses to pay off said indebtedness and failed and refused to protect and preserve the credit of said Dora E. Rooker at banks and failed and refused to continue or permit continuance of the work of said improvement and the completion and installation thereof, but on the contrary said Fidelity Trust Company by failing and refusing to pay said indebtedness and falsely and wrongfully misrepresented the credit and condition of the said trust estate wholly destroyed the credit of the said Dora E. Rooker at banks and elsewhere and said Trust Company stopped work on said improvement and forced and required contractors to abandon work thereon in such manner as that said Dora E. Rooker was wholly without recourse against said contractors, and said Fidelity Trust Company caused and required said contractors to turn over and assign to it their said contracts and it wrongfully caused and required them to incumber said real estate and cloud the title thereof with notices of liens and otherwise and it also wrongfully caused them to sue on claims all to the end that said trust estate might be so wasted and wrecked as that said trust estate could the better be appropriated by the said Fidelity Trust Company and to that end it caused its co-defendant herein to be and become parties to its said breaches of said contract by filing notices of lien and instituting suits against these plaintiffs that said actions at law are now pending
24 and said liens are of record and these plaintiffs aver that said Fidelity Trust Company is the real party in interest in said record liens and in said pending actions that said co-defendants herein are each made parties to answer to their respective interest in the premises that said Fidelity Trust Company has failed and refused to pay the taxes and interest charged against said real estate but has allowed the same to become delinquent and in default and has refused to sell said real estate or any part thereof though it has had the opportunity so to do, having in one instance had an opportunity to dispose of said real estate in Marion County at a fair cash valuation of twenty-three thousand dollars; and it failed and refused to make provisions for the maintenance of the business

carried on said real estate by reason whereof crops thereon were wholly lost and said Marion County farm remained idle and wholly unproductive for two years at an annual loss of fifteen hundred dollars; that by reason of the premises the said Dora E. Rooker has been damaged fifteen thousand dollars; that prior to the beginning of this suit said Trust Company wholly repudiated its said Trust and served written notice thereof on this plaintiff; that a copy of said notice marked Exhibit No. 1 is filed herewith.

Wherefore these plaintiffs demand judgment, that on accounting be had of the extent of the interest of said Fidelity Trust Company in and to said property and that a reasonable time be fixed in which said indebtedness may be paid, and that in the *mean* time a Receiver be appointed to take over and hold said real estate upon terms and conditions of said trust agreement, and to perform with
25 respect thereto such duties as the Court may from time to time direct and that damages sustained by said Dora E. Rooker because of the non-performance of said contract be ascertained, and that she be given judgment accordingly; that the said co-defendants of said Fidelity Trust Company be required to set up their several respective interests in the premises on *on* default that they be forever barred and shut out and that Clerk of the Court upon the rendition of such judgment be ordered and directed to enter of record the release and satisfaction of each and every such lien and incumbrance and plaintiffs pray for all proper relief.

W. V. ROOKER,
Plaintiff's Attorney.

EXHIBIT No. 1.

Demand and Tender of Deed.

To Dora E. Rooker and William V. Rooker, her husband, Noblesville, Indiana:

The undersigned Fidelity Trust Company Trustee, and Fidelity Trust Company, hereby demand payment to them of the sum of eighteen thousand four hundred fifty-three and thirty-four cents ($18,453.34) due on account of advancements and made under agreement of trust and *secured* by the Hamilton County farm, and demand payment of the sum of one thousand two hundred forty dollars and seventy cents ($1,240.70) due on account of advancements made under agreement of trust and secured by the Marion County farm, making a total of Nineteen thousand six hundred and ninety-four cents (-19,694.04) and the said Fidelity Trust Company, Trustee, herein tenders for delivery its said quit-claim deeds, conveying and quit claiming said Hamilton County and Marion County farms to the original grantors upon payment to them of the fore-
26 going demand and farther give notice that upon failure to make payment of the aforesaid sum upon demand now made, that said quit claim deeds will remain at the office of Fidelity Trust

Company for delivery until October 30th, 1912 upon payment of the aforesaid demand.

[SEAL.] (Signed) FIDELITY TRUST COMPANY,
Trustee,
By W. M. FOGARTY,
President.

FIDELITY TRUST COMPANY,
By W. M. FOGARTY,
President.

Attest:
JAMES G. FLAHERTY,
Secretary.

EXHIBIT "A."

This memorandum executed in duplicate, at the City of Indianapolis, Indiana, this 11th day of Ootocer, 1909 by and between Doro E. Rooker and William V. Rooker, her husband, of Hamilton County, Indiana first parties, and the Fidelity Trust Company of Indianapolis, Indiana, second party, witnesseth:

Par. 1. That concurrently herewith and as a part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed, conveyed to second parties as Trustee, ever upon the conditions and trust and upon the powers herein and for uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, towit:

The South-east quarter of the North-east Quarter of Section 33, Township 17, Range Four East, containing forty acres, more or less.

Also the South-west Quarter of North-west Quarter of Section 34, Township 17, North, Range 4 East, containing forty acres more or less.

27 Also the following real estate in Hamilton County in the State of Indiana, to wit;

All the west half of the north half of section 18, township 18, north, range 5 east, lying west of the Lake Erie and Western Railroad, containing 92 acres, more or less.

Also the southwest quarter of section 7, township 18 north, range 5 east, lying west of the Lake Erie and Western Railroad and east of White River, containing 48 acres, more or less.

Also the southeast quarter of section 12, township 18 north, range 4 east, containing 60 acres, more or less and lying south and east of White River.

Also all that part of the northeast quarter of section 13 township 18 north, range 4 east, more particularly described as follows:

Beginning at the northeast corner of said section, and running thence west with said section line one hundred and thirty two rods, more or less to White River, thence south-ly along with said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section thence east 65.80 rods; thence south 73.15

rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning containing 75 acres, more or less.

That reference is hereby made to the said warranty deed and to the several descriptions therein for greater certainty.

Par. 2. The said warranty deed is made upon the conditions and trust and upon powers and for the uses and purpose herein particularly set forth, that is to say:

Whereas, the said Dora E. Rooker the grantor in said deed
28 and first party herein, is the owner in her own separate right and estate of the said above described lands, situated in said Hamilton County, and the said Dora E. Rooker and William V. Rooker her husband, grantors in said deed, and parties of the first part herein are the owners as tenants by entireties of said real estate situated in said Marion County, and.

Whereas, the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, as heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, and in so doing has been obliged to lay out and expend large sums of money and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay, and

Whereas, the said improvements have been carried so far toward completion as they cannot be now abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; and,

Whereas, it requires Six Thousand ($6,000.00) Dollars to complete said improvements, and to pay off indebtedness of said Dora E. Rooker incurred by — arising out of the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of the making of said improvements.

Now therefore, it is agreed that the said Fidelity Trust Company, second party herein, shall and it does hereby accept the title
29 of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say:

Clause A. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and directions of said Dora E. Rooker, not exceeding the sum of $6,000 for and on account of the erection and construction of said dwelling house, outbuildings and improvements and the quipment and installation thereof, it being expressly understood and agreed that a part of said indebtedness is held or may hereafter be held by banks on account of advancements and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal of said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness, shall be forever bind-

ing and conclusive on all parties concerned; that such debt or debts so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

Clause B. The Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A, of this paragraph as said Trust Company may deem necessary to protect its interest in and to said real estate and to perform or better promote the performance of the trust herein and hereby created and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as full as if the same were made upon her express written direction.

Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker any sum or sums of money whether within or in excess of the sum of $3,000.00 as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

Clause D. Said Fidelity Trust Company is hereby appointed and empowered and authorized as a true and lawful Attorney in fact of the second parties and in their separate deed joint name, place right and stead to execute a dee of general warranty or deeds of general warrant conveying said real estate or any part or parts thereof upon the limitations hereinafter stated and provided.

Par. 3. Said Fidelity Trust Company shall have and receive for its compensation, Trustee's fee of One Hundred and Fifty ($150.00) Dollars and a commission of two (2) per cent. on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with the interest on all such moneys at the rate of six (6) per cent per annum to be credited semi-annually to the said Fidelity Trust Company as a debt and charge against said Dora E. Rooker; and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company pursuant to this agreement; and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth (1/8) of one (1) per cent, of all notes for ninety (90) days or less for moneys obtained from any bank to the credit of the said Dora E. Rooker on her paper originally made

Par. 4. It is further ever understood and agreed that at any time within one (1) year after the date of these presents said second party may execute and perform so much of the power to sell and convey as is hereinbefore granted as pertains to said Marion County real estate, provided always that the sum received in consideration therefor shall be net to the credit of the said Dora E. Rooker

Eighteen Thousand ($18,000.00) dollars after the payment of the commission hereinbefore mentioned.

Should it so happen that said Marion County real estate be not sold within said period of one year for said sum of Eighteen Thousand ($18,000.00) dollars plus commission, then after ninety (90) days' notice in writing to be given to first parties by second party, the said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring and if said Marion County real estate does not sell for lack of a bid, then second party may, upon ninety (90) days' notice in writing to be given to the first parties by the second party, sell and convey said Hamilton County real estate for whatever it will bring over and above the agreed and upset price of sixty-five Thousand ($65,000.00) dollars. If said Hamilton County real estate does not sell for the sum of Sixty-five Thousand ($65,000.00) dollars for lack of a bid, of that sum then the said second party hereto may publicly
32 advertise and sell said Marion County real estate after ninety (90) days' notice given in writing to first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale do not fetch enough to pay the moneys and perform the obligation herein charged upon and against the said real estate, then said second party may proceed to sell and sell Hamilton County real estate in the manner and form prescribed as to said Marion County real estate, after thirty (30) days' notice given in writing to first parties by second party.

It is *every* understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of said real estate made pursuant to this agreement as follows:

1. To the payment of any mortgage or other valid lien charge, adverse interest or incumbrance upon and against said real estate or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

2. To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties herein authorized and provided.

3. To the payment of moneys obtained by second party from any bank or banks to the use and benefit of said Dora E. Rooker, upon her paper as hereinbefore authorized and provided.

4. The rest and residue of any money shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

Par. 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the
33 provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if said deed were made by the first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant of this memorandum and in execution of

the powers and upon the trust and confidence herein and hereby imposed.

Par. 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors, and assigns.

In execution whereof the several prospective parties have hereunto affixed their hands and seals at the date and place first above written.

(Signed) DORA E. ROOKER
WILLIAM V. ROOKER.
FIDELITY TRUST COMPANY.
Per W. M. FOGARTY,
President.

Attest:
THOMAS B. FULMER,
Secretary.

34 And the Court now orders process issued on said amended complaint to the following defendants, to wit: to the Sheriff of Marion County for James W. Lilly, and Frank D. Stalnaker, Balke & Krauss Company, and Illinois Surety Company, returnable November 1st, 1913 and to the Sheriff of Clinton County, David I. Neher returnable November 1st, 1913.

And the defendant, Fidelity Trust Company now files its answer to said amended complaint, which answer is in the words and figures following to wit: (H. I.) And the plaintiffs now file their answer, to the cross-complaint, of the Fidelity Trust Company, in eleven paragraphs, which answer is in the words and figures following to wit (H. I.) And the defendant Fidelity Trust Company now files a reply to each paragraph of the cross-complaint herein except the first paragraph thereof which reply is in the words and figures following to wit: (H. I.) And afterwards to wit: On the 25th day of October, 1913, being the 18th judicial day of the October Term, 1913 of said Court, the following proceedings were had to wit: "Comes now the firm of Lilly & Stalnaker and files disclaimer, in the following words and figures to wit: (H. I.)"

And afterwards to wit: On the 27th day of October, 1913 being the 19th judicial day of said term of said Court, the following proceedings were had to wit:

Comes now Whitcomb, Dowden & Stout and files appearance for Illinois Surety Company as follows, (H. I.)

And afterwards to wit: On the 5th day of November, 1913, being the 27th judicial day of the October Term, 1913, of said Court, the following proceedings were had to wit:

"Come now the parties and the defendant Illinois Surety Company now files its separate answer in the following words
35 and figures to wit: (H. I.) And the defendants now ask permission of the Court to file an amended Cross-complaint. Permission to file an amended cross-complaint is now granted by

the Court. To which ruling of the Court, plaintiffs Dora E. Rooker and William V. Rooker, separately and severally object and except.

Said defendant now file- its amended *corss*-complaint in the following words and figures to wit:

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY.

Comes now Fidelity Trust Company, defendant, in the above entitled cause, and by way of amended cross-complaint herein against the plaintiffs Dora E. Rooker and William V. Rooker says that it is a corporation orga*in*zed under and pursuant to the laws of the State of Indiana.

Said cross-plaintiff avers that on the 11th day of October, 1909, said Dora E. Rooker then being the owner in her own separate right and estate of certain lands situate in Hamilton County, Indiana, hereinafter described and said Dora E. Rooker and William V. Rooker her husband, being the owners as tenants by entireties of certain lands in Marion County, Indiana, hereinafter described, and the said Dora E. Rooker having prior to said date undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary proper strustures and to equip the same with modern utilities and conveniences and in so doing *have* been obliged to lay out and expend large sums of money and incur obligations beyond her means to pay and being then de-
36 sirous of borrowing certain sums of money for the purpose of paying off outstanding obligations of the said plaintiff Dora E. Rooker and which were charge- against her separate estate and for the further purpose of completing the improvements which were then in process of construction and erection on the separate real estate of said Dora E. Rooker and which is hereinafter described and for the purpose of carrying on the business of said Dora E. Rooker which consisted in operating the farm lands hereinafter described in Hamilton County, State of Indiana, the said plaintiff herein and cross-complainant entered into a written contract wherein it was mutually agreed that the said cross-plaintiff Fidelity Trust Company should pay and it did agree to p-y from time to time upon the written order and direction of said Dora E. Rooker the sum of six Thousand Dollars for and on account of the erection and construction of the dwelling house, outbuildings and improvements and the equipment and installation thereof, all situated on the lands

of the said plaintiff Dora E. Rooker hereinafter described, in Hamilton County, State of Indiana; that it was further provided in said contract that said cross-plaintiff Fidelity Trust Company should pay certain indebtedness of the plaintiff Dora E. Rooker then held or thereafter held by banks on account of advancements or which might be made to said plaintiff Dora E. Rooker; that by said written contract it was further provided that said cross-plaintiff Fidelity Trust Company may lay out and expend any further sum or sums of money as said Fidelity Trust Company may deem necessary to protect its interest in and to said real estate and it was specifically provided in said contract that every such advancement or payment made by said cross-plaintiff, Fidelity Trust Company, shall
37 be deemed and taken to be the debt of the said plaintiff Dora E. Rooker; that by said written contract it was further provided and agreed to that said cross-plaintiff Fidelity Trust Company shall have and receive for its compensation a fee of $150.00 and a commission of two per cent on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest and to promote a true and better performance of its trust, together with interest on all such moneys at the rate of six per cent per annum to be credited semi-annually to said cross-plaintiff Fidelity Trust Company as a debit and charge against the said plaintiff Dora E. Rooker. A copy of which written contract is made a part hereof and marked Exhibit "A."

Said cross-plaintiff further avers that to secure the repayment of any and all sums of money then and thereafter to be advanced by this cross-plaintiff under and pursuant to the terms of said contract aforesaid, the said Dora E. Rooker and her husband William V. Rooker executed to this cross-plaintiff on the 11th day of October, 1909, concurrently with and as a part of the aforesaid contract a mortgage in form of a deed on certain real estate in Hamilton County, State of Indiana; owned by said Dora E. Rooker, in fee simple, which said real estate is described as follows, to wit:

All the West half of the North half of Section eighteen (18), Township, Eighteen (18), North, Range Five (5) East, lying West of the Lake Erie & Western Railroad containing Ninety-two (92) Acres, more or less.

Also the Sourthwest Quarter of Section seven (7), township, Eighteen, (18), North, Range Five (5) East, lying West of Lake Erie & Western Railroad and East of White River, containing forty-eight (48) acres more or less.
38

Also the Southeast Quarter of Section twelve, (12), Township Eighteen, (18), North, Range four (4) East, containing sixty (60) acres more or less and lying South and East of White River.

Also that part of the North-East Quarter of Section thirteen (13), Township Eighteen (18), North, Range four (4) East, more particularly described as follows:—Beginning at the North-east Corner of said Section and running thence West with said Section line One Hundred Thirty-two (132) rods more or less to White River, thence Southerly along said stream with the meanderings thereof to a point 39.95 rods South of the North line of said Section; thence East

65.80 rods; thence South, 73.15 rods; thence East 68.25 rods; thence North 115.20 rods to the place of beginning containing seventy-five (75) acres more or less.

The said cross-plaintiff further avers that on said 11th day of October, 1909, as further security for said sums of money then and to be thereafter advanced as aforesaid the said Dora E. Rooker and said William V. Rooker her husband concurrently with and as a part of said contract executed to this cross-plaintiff a mortgage but in form of a deed on certain real estate then owned by said Dora E. Rooker and William V. Rooker in fee simple as tenants by entireties situated in Marion County State of Indiana, which is described as follows, towit:

The South-east Quarter of the North-east Quarter of Section thirty-three (33) Township seventeen (17) North, Range four (4) East, containing forty (40) acres more or less.

39 Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north range four (4) east containing forty (40) acres more or less.

And said deeds aforesaid are made a part hereof and marged Exhibits B and C respectively that said deeds aforesaid were duly recorded in the office of the county Recorder where said lands are situate, the first described instrument being recorded in the Recorder's office of Hamilton County, Indiana and the second described in the Recorder's office of Marion County, Indiana.

Said cross-complainants aver that while said deeds aforesaid were executed to the Fidelity Trust Company, Trustee, that the same were intended to secure the money advanced by said Fidelity Trust Company and that all amounts advanced as herein set forth were advanced by the Fidelity Trust Company under the contract and agreement hereinbefore set out.

The said cross-plaintiff further avers that in order to complete said improvements on said separate lands of said Dora E. Rooker, hereinbefore described in Hamilton County Indiana and in order to pay off the indebtedness incurred by her it paid out upon the order of said Dora E. Rooker a large sum of money $9,966.43 all of which was for the separate use of said Dora E. Rooker.

Said cross plaintiff further avers that said Dora E. Rooker at the time of the execution of said contract and said instruments of conveyance aforesaid and at all times up to the present time was engaged in farming said real estate described located in Hamilton County, Indiana and that in order to carry on said business of farming and for the maintenance and care of said real estate the

40 said cross-plaintiff advanced upon the order of said Dora E. Rooker a large sum of money, towit, $1,355.50.

The said cross-plaintiff further avers that after the execution of said deeds of conveyance aforesaid a mechanics' lien was filed against said Hamilton County real estate on account of certain improvements placed thereon by Pinell-Dulin Company. That suit was instituted in the Circuit Court of Hamilton County, Indiana for the foreclosure thereof and judgment was obtained thereon against said Dora E. Rooker and a decree of foreclosure entered. That there-

after upon the order of said Dora E. Rooker this cross-plaintiff paid the sum of $384.63 to satisfy and release said judgment; that after the execution of said deeds of conveyance aforesaid a mechanics' lien was filed against said Hamilton County real estate on account of certain improvements that had been placed thereon by Daniel Nehr that thereafter this cross-plaintiff upon the order and at the special instance and request of Dora E. Rooker paid to said Daniel Nehr the sum of $325.00 in satisfaction and release of said lien; that after the execution of said deed of conveyance aforesaid a mechanics' lien was filed against said Hamilton County real estate on account of certain improvements that have been placed thereon by Ludowici Celadon Company. That suit was instituted in the Circuit Court of Hamilton County for the foreclosure thereof and judgment was obtained thereon against said Dora E. Rooker and a decree of foreclosure and order of sale of said lands adjudged by said Court. That afterwards said Dora E. Rooker took an appeal of said cause from the Circuit Court of Hamilton County to the Appellate
41 Court of Indiana and in order to perfect said appeal it was necessary for said Dora E. Rooker to execute her bond in the penal sum of $500.00 that said Dora E. Rooker gave as surety on said bond the Illinois Surety Company as indemnity the sum of $500.00 and as a premium for signing said bond the additional sum of $5.00, that afterwards said cause of action against said Dora E. Rooker was affirmed by the said Appellate Court of Indiana and the said surety aforesaid appropriated said sum of money so paid by this cross-plaintiff at the special instance and request of said Dora E. Rooker to protect itself against liability on account of said bond aforesaid, that after the execution of said deeds of conveyance aforesaid a further mechanics' lien was filed against said Hamilton County real estate on account of certain improvements that have been placed thereon by Balke Kraus Company. That suit was instituted in the Circuit Court of Hamilton County for the foreclosure and a judgment was obtained thereon against said Dora E. Rooker and a decree of foreclosure and order of sale entered against the said lands of said Dora E. Rooker. That afterwards an execution was issued to the Sheriff of Hamilton County on said decree aforesaid and to protect the interests of this cross-plaintiff it paid to said Balke Kraus Company the sum of $571.21 and took an assignment of its said judgment and lien and now hold the same assigned of record to the cross-plaintiff.

The said cross-plaintiff further avers that at the time of the execution of said contract and said mortgages aforesaid said Hamilton County real estate described herein was incumbered by a mortgage executed by Dora E. Rooker and William V. Rooker and her
42 husband and in the sum of *of* $14,000.00 and said Marion County real estate was incumbered by a mortgage executed by said Dora E. Rooker and William V. Rooker in the sum of Six Thousand Dollars, that the said Dora E. Rooker and William V. Rooker failed and neglected and refused to pay the interest on said mortgages as the same became due and that in order to protect the

rights of this cross-plaintiff and its said security it paid out for interest on said two mortgages aforesaid the sum of $3,628.45.

Said cross-plaintiff further avers that said Dora E. Rooker and William V. Rooker failed, neglected and refused to pay the taxes as the same became due and payable on said Hamilton County and said Marion County real estate and that in order to protect the rights of this cross-plaintiff it and its said security it paid out for taxes on said Hamilton and Marion County real estate above described a large sum of money the sum of $1,058.95.

The said cross-plaintiff further avers that after the execution of said instruments of conveyance it became necessary to employ attorneys to appear in the various suits of foreclosure set forth herein, to appear and defend the same and in order to protect the rights of this cross-plaintiff and its said security and protect the title of said Dora E. Rooker; that it paid out in the way of attorney's fees in defending the interests of itself and Dora E. Rooker aforesaid the sum of $150.00. That in like manner it became necessary to prepare continuations of the abstract of title to said Hamilton County and Marion County lands and to expend miscellaneous items in telephone calls and in making *trips* between the cities of In-
43 dianapolis and Noblesville: that this cross-plaintiff laid out and expended for said purpose the sum of $25.20.

Said cross-plaintiff would further aver that at the special instance and request of the said plaintiff Dora E. Rooker it laid out and expended for advertising and for automobile hire in showing the Marion County farm to prospective purchasers the sum of $15.41.

Said cross-plaintiff further avers that when said contracts and said deeds aforesaid were prepared it was necessary to employ attorneys for said purposes and also for the purpose of examining the abstracts of title to said real estate and that by agreement between said Dora E. Rooker and this cross-plaintiff it paid for said service the sum of $25.00.

Said cross-plaintiff further avers that it was agreed in said contract aforesaid that cross-plaintiff herein was to receive for its services at that time performed the sum of $150.00 and two per cent as commission upon all sums advanced by it and additional sum of interest at the rate of six per cent on all money advanced by cross-plaintiff herein, said interest to be charged against said Dora E. Rooker semi-annually. That at the time when said contract and deeds aforesaid were executed and delivered there was further expended for fire insurance premium the sum of $95.00 and for recording deed to the Hamilton County lands $1.70 and to the Marion County lands $1.50.

Cross-plaintiff further avers that since the filing of the plaintiff's complaint herein and since the filing of the original cross-complaint this cross-complainant has laid out and expended certain sums of money hereinafter set forth for the purpose of protecting
44 the rights and interests of this cross-complainant and the money so loaned by it to said Dora E. Rooker as follows, to-wit:

That on the 16th day of April, 1913, this defendant *defendant* paid to the Hamilton Trust Company of Noblesville, Indiana, $6.00 for the continuation of the Abstract to the real estate situate — Hamilton County, Indiana and described in the cross-complaint herein. That on the 13th day of May, 1913, this cross-complainant paid the taxes on the real estate situate in Marion County, Indiana in the sum of $42.86 and on May 17, 1913, this cross-complainant paid the taxes on the real estate situate in Hamilton County, Indiana amounting to $136.29; that on the 30th day of June, 1913, there existed a mortgage on the real estate situated in Hamilton County, Indiana and described in the cross-complaint herein payable to the American Central Life Insurance Company which said mortgage was executed by said Dora E. Rooker and was prior and senior to the rights of the cross-complainant herein; that said Dora E. Rooker failed to pay the interest on said mortgage aforesaid and in order to protect the rights of this cross-complainant and pursuance to the terms of the deed and contract sued on herein cross-complainant paid to said American Central Life Insurance Company the interest on said mortgage aforesaid amounting in the sum of $426.72. That at the time of the execution of the deeds and contract sued on in the cross-complainant herein, said Dora E. Rooker had executed a mortgage to the Indianapolis Life Insurance Company in the sum
45 of Six Thousand Dollars *Dollars* ($6,000.00) on the real estate in Marion County, Indiana and described in the cross-complaint herein; that said mortgage aforesaid was senior to the rights of this cross-complaint and said plaintiff failed and refused to pay the interest on said mortgage aforesaid. That in order to protect the rights of this cross-complainant and under and pursuant to the said deed and contract sued on in said cross-complaint, cross-complainant paid to said Indianapolis Life Insurance Company interest in the sum of $622.08.

Cross-complainant further avers that Ludowici Caladon Company recovered a judgment in the Hamilton Circuit Court against Dora E. Rooker in the sum of $—, on account of a certain mechanic's lien sued on in said cause; that afterwards said cause was appealed to the Appellate Court of the State of Indiana, and said cause was affirmed. That this cross-complainant deposited with Illinois Surety Company, a certificate of deposit in the sum of $500.00 to secure said Illinois Surety Company from liability on account of joining as surety in the bond of said Rooker given on said appeal aforesaid. That afterwards said cause was affirmed by the Appellate Court and this cross-complainant paid to the Clerk of the Hamilton Circuit Court in satisfaction of said judgment aforesaid the sum of $412.42 the sum being the principal and interest on said judgment aforesaid and this cross-complainant also paid to the Clerk of the Supreme and Appellate Court the sum of $28.70 which was the cost
46 taxed in said cause on account of said appeal to said Appellate Court. That in the cross-complaint sued on in this cause said Dora E. Rooker was charged with said sum of $500.00 aforesaid so deposited to secure said surety as aforesaid. That since the filing of said complaint said judgment aforesaid was paid as herein alleged

and demand has been made upon said surety for the return of said certificate of deposit aforesaid to this cross-complainant. That by reason thereof said Dora E. Rooker is entitled to credit for said sum of $500.00 so charged as aforesaid on account of said certificate of deposit together with the interest thereon and aggregating $58.33 making a total credit to Dora E. Rooker in the sum of $558.33 and said Dora E. Rooker should be charged with said sum of $171.12 so paid as aforesaid together with interest thereon from June 26, 1913, the date of the payment thereof as herein above alleged.

Said cross-plaintiff further avers that pursuant to said contract there is due and owing up to November 1, 1912, to the cross-plaintiff on account of commission as aforesaid and on account of interest on the moneys paid out as aforesaid the sum of $3,251.35.

That there is now due and owing from said Dora E. Rooker to this cross-plaintiff on account of money so advanced as aforesaid and moneys paid out by this cross-plaintiff for the said Dora E. Rooker and the benefit of her estate together with interest thereon as provided in said contract the sum of $22,954.96 together with interest thereon from the first day of November, 1912, all of which is due and unpaid a detailed statement of which as will more fully appear reference being had to cross-plaintiff's bill of particulars filed
47 herewith and made a part hereof and marked Exhibit D.

Cross plaintiff avers that all sums of money paid out by the cross-plaintiff as herein alleged were paid out for the benefit of said Dora E. Rooker under and pursuant to the deeds and the contract as hereinbefore alleged.

Said cross-plaintiff further avers that it has been necessary to employ attorneys herein and that a reasonable fee for cross-plaintiff's attorneys is $1,500.00.

The cross-plaintiff further avers and shows to the Court that the plaintiffs are neglecting to pay the taxes due on the real estate hereinabove described, and are neglecting and refusing to pay the interest on the present existing mortgages on said lands by reason of which neglect and failure of the plaintiffs said lands are in danger of being sold for taxes and said mortgages are about to be foreclosed, that said plaintiffs are neglecting said *said* lands and improvements thereon and permitting waste to be committed thereon and the same to depreciate in value; to the irreparable loss and damage of the cross-plaintiff herein. That said plaintiffs herein are in possession of the lands herein described and that a temporary receiver should be appointed to take possession of said lands and manage the same and collect the rents and profits thereon.

Wherefore cross-plaintiff sues and demands judgment that said deeds aforesaid be declarged a mortgage, that an accounting be had, and that the cross-plaintiff be given judgment against the plaintiff Dora E. Rooker for the amounts found due and owing the
48 cross-plaintiff herein together with interest thereon from the dates of the payment thereof that the amounts so found due and owing cross-plaintiff be adjudged a lien against the real estate herein described and that cross-plaintiff have foreclosure of said mortgage against said Dora E. Rooker and William V. Rooker and that

said real estate or so much thereof as may be necessary for that purpose be sold in satisfaction of the amount found due by the court; that a Receiver be appointed to take charge of the real estate herein described during the equity of redemption and for all proper relief.

By HENRY SEYFRIED.
KANE & KANE,
Att'y. for Cross-plaintiff.

EXHIBIT A.

This memorandum, executed in duplicate at the city of Indianapolis, Indiana, this 11th day of October, 1909 by and between Dora E. Rooker and William V. Rooker, her husband, of Hamilton County Indiana first parties, and the Fidelity Trust Company of Indianapolis, Indiana, second party, witnesseth

Paragraph #1. That concurrently herewith and as a part
49 of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed conveyed to second party as trustee, ever upon the conditions and trust and upon the powers and for the uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, towit:

The South-east quarter of the northeast quarter of section thirty-three (33) township Seventeen (17) north range four (4) east containing forty (40) acres more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north range four (4) east containing forty acres more or less.

Also the following real etsate in Hamilton County, in the State of Indiana, towit:

All the west half of the north half of section eighteen (18) township eighteen (18) north range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

Also the southwest quarter of section seven (7) township eighteen (18) north range Five (5) east lying west of Lake Erie & Western Railroad and east of White River, containing forty-eight (48) acres more or less.

50 Also the southeast quarter of section twelve (12) township eighteen (18) north range four (4) east containing sixty (60) acres more or less and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13) township eighteen (18) north range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods more or less to White River thence southerly along with said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20

rods to the place of beginning, containing seventy-five acres more or less.

That reference is hereby made to the said warranty deeds and to the several descriptions therein for greater certainty.

Paragraph 2. That said warranty deed is made ever upon the conditions and trust and upon the powers and for the uses and purposes herein particularly set forth that is to say:

Whereas the said Dora E. Rooker the grantor in said deed and first party herein is the owner in her own and separate right and estate of the said above described lands situate in said Hamilton County and the said Dora E. Rooker and William V. Rooker
51 her husband, grantors in said deed and parties of the first part herein are the owners as tenants by the entireties of said real estate situate in said Marion County, and

Whereas, the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, has heretofore undertaken to erect and construct a dwelling house and out buildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences and in so doing has been obliged to lay out and expend large sums of money and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay and,

Whereas the said improvements have been carried so far toward completion as that they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate and,

Whereas it requires Six Thousand Dollars ($6,000.00) to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her arising out of the making of the said improvements and in the completion and installation thereof,
52 and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of of the making of said improvements.

Now therefore it is agreed that the said Fidelity Trust Company second party herein shall and it does hereby accept the title of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following that is to say:

Clause *B*. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and directions of said Dora E. Rooker not exceeding the sum of Six Thousand Dollars ($6,000.00) for and on account of the erection and construction of said dwelling house out buildings and improvements and the equipment and installation thereof, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made to said Dora E. Rooker or to the said William V. Rooker as the undisclosed principal of said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit notwithstanding the form of said in-

debtedness shall be forever binding and conclusive on all parties concerned that such debt or debts so ordered to be paid is and
53 are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

Clause B. The said Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A, of this paragraph as said Trust Company may deem necessary to protect its interest in and to said real estate and to perform or better promote the performance of the trust herein and hereby created and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as full as if the same were made upon her express written direction.

(For clause "C", see next page.)

Clause D. Said Fidelity Trust Company is hereby appointed and -powered and authorized as the true and lawful attorney in fact of the first parties and in their separate deed joint name place right, and stead to execute a deed of general warranty or deeds of general warranty conveying said real estate or any part or parts thereof upon the limitations hereinafter stated and provided.

Paragraph 3. Said Fidelity Trust Company shall have and receive for its compensation, Trustee's Fee of One Hundred and Fifty Dollars ($150.00) and a commission of two (2) per cent on all loans and advancements.

54 Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker, any such sum or sums of money whether within or in excess of the sum of Six Thousand Dollars ($6,000.00) as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted, and on any and all moneys laid out
55 and expended by it to protect its interest or to promote the true and better performance of this trust, together with the interest on all such monies at the rate of six (6) per cent per annum to be credited semi-annually to said Fidelity Trust Company as a debit and charge against said Dora E. Rooker, and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate, sold by said Fidelity Trust Company pursuant to this agreement; and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth (1/8) of one (1) per cent of all notes for ninety (90) days or less for monies obtained from any bank to the credit of said Dora E. Rooker on her paper originally made.

Paragraph 4. It is further ever understood and agreed that at any time within (1) year after the date of these presents said second party may execute and perform so much of the power to sell and convey as is hereinbefore granted as pertains to said Marion County real estate provided always that the sum received in consideration

therefore shall be net to the credit of said Dora E. Rooker
56 Eighteen Thousand Dollars ($18,000.00) after the payment of the commission hereinbefore mentioned. Should it so happen that said Marion County real estate be not sold within said period of one year for said sum of Eighteen Thousand Dollars ($18,000.00) plus commission, then after ninety (90) days' notice in writing to be given to first parties by second party, the said second party may publically advertise said Marion County Real estate and sell the same at whatever sum it may bring and if said Marion County real estate does not sell for lack of a bid, then second party may upon ninety (90) days' notice in writing to be given to the first parties by the second party sell and convey said Hamilton County real estate for whatever it will bring over and above the agreed and set price of Sixty-five thousand dollars ($65,000.00). If said Hamilton County real estate do not sell for said sum of Sixty-five Thousand dollars ($65,000.00) for lack of a bid of that sum then the said second party hereto may publically advertise and sell said Marion County real estate after ninety (90) days' notice given in writing to first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale do not fetch enough to pay the monies and perform the obligation therein charged upon and against said real estate then said second party may proceed to sell and sell said Hamilton County real estate in the manner and form
57 prescribed as to said Marion County real estate. After thirty (30) days' notice given in writing to first parties by second party.

It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of said real estate made pursuant to this agreement, as follows:

1. To the payment of any mortgage or other valid lien, charge, adverse interest of incumbrance upon and against said real estate or any part of any of the real estates herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

2. To the payment of monies advanced by second party to the first parties or paid to the use and benefit of first parties as herein authorized and provided.

3. To the payment of monies obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker, upon her paper as hereinbefore authorized and provided.

4. The rest and residue of any money shall be paid to the said Dora E. Rooker her heirs, executors administrators and assigns.

Paragraph 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant by the provisions of this contract shall convey to the grantee therein
58 named an absolute and unqualified estate as fully and completely as if such deed were made by the said first parties

in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant of this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

Paragraph 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors and assigns.

In the execution whereof the several prospective parties have hereunto affixed their hands and seals at the date and place first above written.

DORA E. ROOKER. [SEAL.]
WILLIAM V. ROOKER. [SEAL.]
FIDELITY TRUST CO., [SEAL.]
Per W. M. FOGARTY, [SEAL.]
President.

Attest:
THOMAS B. FULMER,
Secretary.

EXHIBIT B.

Deed.

59 This indenture witnesseth, That Dora E. Rooker and William V. Rooker, her husband of Hamilton County, state of Indiana,

In consideration of One Dollars ($1.00), the receipt of which is hereby acknowledged, and other good and valuable considerations by them had, convey and warrant, to the Fidelity Trust Company, of Indianapolis, Indiana, Trustee, the following real estate in Hamilton County, State of Indiana, towit:

All the west half of the north half of section eighteen (18) township eighteen (18) north range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less,

Also the southwest quarter of section seven (7) township eighteen (18) north range five (5) east, lying west of Lake Erie and Western Railroad and East of White River, containing forty-eight (48) acres more or less.

Also the southwest quarter of section twelve (12) township eighteen (18) north range four (4) east containing sixty (60) acres more or less and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13) township eighteen (18) north range four (4) east more particularly described as follows:

Beginning at the northeast corner of said section and
60 running thence west with said section line one hundred and thirty-two (132) rods more or less to White River, thence southerly along said stream with the meanderings thereof to a

point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy five (75) acres more or less.

To have and to hold, said real estate, however, in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper Trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers, as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Trustee.

And said Fidelity Trust Company, of Indianapolis, as such
61 Trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrances or convey the same subject to any existing incumbrances. And to do any and all acts and to execute any and all papers, which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and conserve the trust hereby created.

And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforcible by it and *connectible* with interest at the rate of 6% per annum, to be credited semi-annually, as a debt and charge against said real estate.

This conveyance is made, subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of a certain principal note of said grantor in the sum of Fourteen Thousand Dollars ($14,000.00) together with interest thereon and recorded in mortgage record 52, page 84 in the office of the recorder of Hamilton County, Indiana.

In witness whereof, said Dora E. Rooker and William V. Rooker, her husband have hereunto set their hands and seals this 11th day of October, 1909.

DORA E. ROOKER.
62 WILLIAM V. ROOKER.

STATE OF INDIANA,
Marion County, ss:

Before me the undersigned, Notary Public, personally appeared William V. Rooker and Dora E. Rooker, his wife, and acknowledged the execution of this deed.

Witness my hand and Notarial Seal this 11th day of October, 1909.

WM. J. McCOY.

My commission expires July 23, 1910.

EXHIBIT C.

Deed.

This indenture witnesseth, that William V. Rooker and Dora E. Rooker, husband and wife of Hamilton County, state of Indiana, in consideration of One Dollar ($1.00) the receipt of which is hereby acknowledged and other good and valuable considerations by them had, convey and warrant to the Fidelity Trust Company of Indianapolis, Indiana, Trustee, the following real estate in Marion County, Indiana to wit:

The southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north range four (4) east containing forty (40) acres more or less.

63 Also the southwest quarter of the northwest quarter of section thirty-three (33) township seventeen (17) north range four (4) east containing forty (40) acres more or less.

To have and to hold said real estate, however, in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company, of Indianapolis, Trustee as aforesaid to sell and *money* said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days' notice in writing, to be given to the grantors by the trustee herein, the Trustee may publicly advertise said real estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such Trustee to execute the proper Trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed, that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee shall convey a good and indefeasible

64 title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do and any such purchaser

or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors, and said Fidelity Trust Company, Trustee, on this date.

The said Fidelity Trust Company of Indianapolis, as such Trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby *created and it is hereby* further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis Trustee, shall be subrogated to all the rights title and interest held by the original parties thus paid and the same shall be collectible and enforcible in its hands,
65 hands, together with interest thereon at the rate of 6% per annum, to be credited semi annually, to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed March 12, 1909 by the grantors William V. Rooker and Dora E. Rooker, husband and wife to Indianapolis Life Insurance Company to secure the payment of one (1) principal note of the sum of Six Thousand Dollars ($6,000.00) and interest coupon notes thereon, which mortgage is recorded in mortgage record 523 page 128 in the office of the Recorder of Marion County, State of Indiana.

In witness whereof, said William V. Rooker and Dora E. Rooker *E. Rooker* have hereunto set their hands and seals this 11th day of October, 1909.

WILLIAM V. ROOKER.
DORA E. ROOKER.

STATE OF INDIANA,
Marion County, ss:

Before me the undersigned, Notary Public, personally appeared William V. Rooker and Dora E. Rooker, husband and wife and acknowledged the execution of this deed.

Witness my hand and Notarial Seal this 11th day of Octo-
66 ber, 1909.

WM. J. McCOY,
Notary Public.

My commission expires July 23, 1910.

EXHIBIT "D."

Bill of Particulars of Amounts Advanced and Laid Out on Account of the Hamilton County Lands.

Voucher No.		Date. 1909.		Amount.
1. (Ex. 3.)	(1.)	Oct. 13.	Indianapolis Mortar & Fuel Co., upon the written order of Dora E. Rooker for fifty barrels of Lehigh dement paper at $1.20 per bbl. which material aforesaid was used in building of improvements on the lands of said Dora E. Rooker in Hamilton Co.	$60.00
2. (Ex. 4.)	(2.)	Oct. 13.	Balke and Krause Co. upon the written order of Dora E. Rooker as part payment on contract for material furnished to said Dora E. Rooker and used in the improvements made on her lands.....	1,000.00
3. (Ex. 5.)		Oct. 14.	W. H. Johnson Son and Co., on the written order of Dora E. Rooker on contract with said W. H. Johnson Son & Co. for heating apparatus and fixtures placed in the house erected by said Dora E. Rooker on her lands.....	400.00
4. (Ex. 6.)		Oct. 16.	To Fidelity Trust Co., upon the written order of Dora E. Rooker in payment of money advanced in the name of William V. Rooker at the special instance and request of Dora E. Rooker which money was used for her own use and benefit and appoied for the benefit and advantage of her own separate estate (as per affidavit dated November 27th)	350.00
6. (Ex. 7.)		Oct. 16.	Fidelity Trust Co., upon the written order of Dora E. Rooker in payment of money advanced in the name of William V. Rooker at the special instance and request of Dora E. Rooker, which money was used for her own use and benefit and applied for the benefit and advantage of her own separate estate (as per affidavit dated November 27th)	300.75
7. (Ex. 8.)		Oct. 16.	Cash upon the written order of Dora E. Rooker on account of pay roll and sundries created and used by said Dora E. Rooker in the improvements of her seaparate estate	300.00
8. (Ex. —.)		Oct. 16.	Cash upon the written order of Dora E. Rooker on account of pay roll and sundries created and used by said Dora E. Rooker in the improvement of her separate estate.	350.00

Bill of Particulars of Amounts Advanced and Laid Out on Account of the Hamilton County Lands.—Continued.

Voucher No.		Date. 1909.		Amount
9.	(Ex. 10.)	Oct. 22.	Cash to Pittsburg Plate Glass Co. upon the written order of Dora E. Rooker to pay balance on contract for glass furnished in house erect' on her land.....	265.00
10.	(Ex. 11.)	Nov. 12.	To W. R. Evans and Co., upon the written order of Dora E. Rooker for erecting and constructing stair ways in the house of said Dora E. Rooker on her separate lands.....	73.00
11.	(Ex. 12.)	Nov. 17.	To Daniel Stewart Co., on account in full for paints and oils furnished in the erection and construction of the dwelling house on the separate lands of said Dora E. Rooker.....	69.88
12.	(Ex. 13.)	Nov. 27.	To cash for pay roll, sundries, brick, etc. incurred and used for the benefit of said Dora E. Rooker's estate	100.00
14.	(Ex. 14.)	Nov. 29.	Humphrey and Sargent upon written order of Dora E. Rooker on account of tin work on residence of said Dora E. Rooker erected on her separate lands	400.00
69				
15.	(Ex. 15.)	Dec. 4.	To cash upon the written order of Dora E. Rooker to pay farm pay roll sundries on house lime, all done on and for the benefit of said Dora E. Rooker's separate estate..	85.00
16.	(Ex. 16.)	Dec. 11.	To cash upon the written order of Dora E. Rooker to pay farm pay roll for labor done on her separate estate	45.00
17.	(Ex. 17.)	Dec. 16.	Western Brick Company upon written order of Dora E. Rooker to pay for 2 000 brick furnished for building of residence of said Dora E. Rooker on her separate lands..	20.00
18.	(Ex. 18.)	Dec. 18.	To cash upon written order of Dora E. Rooker to pay weekly pay roll for farm labor done on the separate lands of said Dora E. Rooker.	25.00
19.	(Ex. 19.)	Dec. 24.	To cash upon the written order of Dora E. Rooker to pay farm pay roll and maintenance performed and done on separate lands of Dora E. Rooker	35.00
20.	(Ex. 20.)	Dec. 31.	Cash on the written order of Dora E. Rooker to pay farm pay roll done and performed on the lands	
70			of Dora E. Rooker.....	25.00
21.	(Ex. 21.)	Dec. 31.	Lilly & Stalnaker on account of hardware furnished Dora E. Rooker's residence erected upon her separate lands	300.00

Bill of Particulars of Amounts Advanced and Laid Out on Account of the Hamilton County Lands.—Continued.

Voucher No.	Date. 1909		Amount.
22. (Ex. 22.)	Jan. 4.	To W. H. Johnson Son and Co. upon the written order of Dora E. Rooker to balance in full for heating system and plant placed in residence of said Dora E. Rooker on her separate lands.....	400.00
23. (Ex. 23.)	Jan. 6.	W. H. Johnson & Son Co. upon the written order of Dora E. Rooker for correction of error made in final and full settlement for heating plant erected in residence of Dora E. Rooker upon her separate lands and estate.....	50.00
24. (Ex. 24.)	Jan. 15.	To cash upon written order of Dora E. Rooker to pay farm pay roll on account of work done on the separate lands of said Dora E. Rooker	35.00
25. (Ex. 25.)	Jan. 31.	Cash on written order of Dora E. Rooker to pay certain notes on account of Dora E. Rooker, towit: One note dated November 6, 1909..... $100.00 One note dated October 26, 1909..... 507.50 One note dated November 13, 1909..... 100.00 One note dated November 13, 1909..... 125.00	
71		The above notes representing money paid by her for labor and material in construction of her residence and for labor and supplies in maintenance and up keep of her own separate estate.....	832.50
26. (Ex. 26.)	Jan. 31.	To cash upon written order of Dora E. Rooker to pay expenses in operation of her farm February 1, 1910.....	65.00
27. (Ex. 27.)	Feb. 15.	To cash upon the written order of Dora E. Rooker to pay farm pay roll to date and carpenter work on house, both incurred and done for the benefit of her separate estate.....	50.00
28	Feb. 28.	Netherington and Berner upon the written order of Dora E. Rooker in full for structural iron work done upon her residence erected upon her separate estate.....	182.65
29. (Ex. 29.)	Feb. 28.	To Stewart Carey Glass Co. balance in full upon the written order of Dora E. Rooker for glass furnished in her residence erected upon her separate estate.....	2.60
30. (Ex. 30.)	Feb. 28.	Cash upon the written order of Dora E. Rooker in payment of pay roll for maintenance of her farm to date.....	45.00
72			

Bill of Particulars of Amounts Advanced and Laid Out on Account of the Hamilton County Lands.—Continued.

Voucher No.		Date. 1909.		Amount
31.	(Ex. 31.)	Mar. 31.	Cash upon the written order of Dora E. Rooker in payment of pay roll for maintenance of her farm to date	62.50
		1910.		
32.	(Ex. 32.)	Apr. 9.	Le Roy J. Patty, Clerk Hamilton County Circuit Court upon the written order of Dora E. Rooker in payment of principal and interest judgment of Pinnell & Dulin Co. v. Dora E. Rooker on foreclosure of mechanic's lien in cause 15,306 which foreclosure of mechanic's lien was a judgment carrying with it an order of sale of the lands of said Dora E. Rooker	384.62
33.	(Ex. 33.)	Apr. 9.	Geo. W. Keyser upon the written order of Dora E. Rooker on account of plumbing done in the building of the residence on the lands of said Dora E. Rooker	100.00
34.	(Ex. 34.)	Apr. 12.	Lacy Seed and Hay Co. upon the written order of Dora E. Rooker for seed purchased to be used on the farm of said Dora E. Rooker	184.50
35.	(Ex. 35.)	Apr. 15.	Cash upon written order of Dora E. Rooker, pay roll on her farm for two weeks ending April 16, 1910	62.50
36.	(Ex. 37.)	Apr. 19.	Balke and Krause Co. upon written order of Dora E. Rooker to balance of material furnished for the building of her residence upon her separate estate being balance of account excepting the unsettled part of the contract	2,595.25
73				
37.	(Ex. 38.)	Apr. 29.	Cash upon written order of Dora E. Rooker to pay farm pay roll and maintenance of farm for two weeks ending April 30, 1912	62.50
38.	(Ex. 39.)	May 11.	To cash upon written order of Dora E. Rooker two weeks pay roll ending May 16	62.50
43.	(Ex. 40.)	May 28.	Cash upon the written order of Dora E. Rooker to pay roll for maintenance for two weeks ending June 1, 1910 of Dora E. Rooker's farm	62.50
45.	(Ex. 41.)	June 15.	Cash upon the written order of Dora E. Rooker in payment of following:	
			For labor on walks finishing porches	50.00
			Two extra amounts in pay roll farm work $18.00 each	36.00
74			Regular pay roll	62.50
			All paid out and expended for the benefit of separate estate of said Dora E. Rooker.	

Bill of Particulars of Amounts Advanced and Laid Out on Account of the Hamilton County Lands.—Continued.

Voucher No.	Date. 1910.		Amount
46. (Ex. 42.)	June 30.	Cash upon the written order of Dora E. Rooker to pay farm pay roll for two weeks ending July 1910...	130.00
47. (Ex. 43.)	July 6.	Kane and Kane attorneys, to Daniel Neher, plaintiff in the case of Neher vs. Rooker No. 5804 in Hamilton Circuit Court to pay in full principal, interest and attorneys' fees in said cause on foreclosure of mechanic's lien, which mechanic's lien was a valid and subsisting lien and charge against said Dora E. Rooker's lands.....	325.00
49. (Ex. 44.)	July 19.	To cash on account of harvesting 55 acres wheat and farm labor and maintenance in full for half month ending July 15th upon the written order of Dora E. Rooker.....	220.00
50. (Ex. 45.)	Aug. 11.	To Citizen's State Bank upon the written order of Dora E. Rooker in payment of promissory notes principal amount with 6% interest, towit: One note 6-22-09..... $881.84 One note 6-28-09..... 200.00 One note 7-7-09..... 300.00 being notes executed by Dora E. Rooker the monies of which were applied for her sole and separate use.	1,473.75
51. (Ex. 46.)	Aug. 26.	Illinois Surety Co. upon the written order of Dora E. Rooker to pay premium on *supercedias* proceeding Cause No. 7783 in Appellate Court of Indiana wherein William V. Rooker and Dora E. Rooker are appellants and Ludowici Caladon Co. is appellee and Indemnity to indemnify said Surety Co. as surety on said Bond in the event the judgment over which said appeal is prosecuted shall be finally affirmed, which judgment referred to is a judgment of foreclosure of a mechanic's lien against the lands of said Dora E. Rooker.....	505.00
	1913.		
3. (Ex. 47.)	March 19.	Balke and Krauss Co. for assignment of judgment and lien in foreclosure against Dora E. Rooker in Hamilton County Circuit Court.....	571.21
		Total	$13,107.77

76 EXHIBIT "D."

Bill of Particulars of Amounts Advanced and Laid Out on Account of Interest on Price Mortgage on Hamilton County Farm.

Voucher No.		Date.		Amount.
13.	(Ex. 48.)	November 27, 1909.	To interest Coupon on mortgage	420.00
			To eight days' interest at 8%	.75
40.	(Ex. 49.)	May 3, 1910.	To Semi annual interest on mortgage on Dora E. Rooker real estate as evidenced by coupon note	420.00
53.	(Ex. 50.)	November 19, 1910.	In full semi-annual installment interest on mortgage on home farm in Hamilton County	420.00
60.	(Ex. 51.)	May 1, 1911.	To semi annual installment interest on mortgage loan on Hamilton County farm	420.00
62.	(Ex. 52.)	November 17, 1911.	To semi annual *inter-* interest on mortgage loan on Hamilton County farm	420.00
66.	(Ex. 53.)	May 19, 1912.	To semi annual interest on mortgage on Hamilton County farm	420.00
			Total	$2,520.75

77 EXHIBIT "D."

Bill of Particulars of Amounts Advanced and Laid Out on Account of Interest on Prior Mortgage on Marion County Farm.

Voucher No.		Date.		Amount.
82.	(Ex. 54.)	Dec. 10, 1909.	To Interest coupon on mortgage loan to Sept. 12, '09	182.70
83.	(Ex. 55.)	Apr. 16, 1910.	To Interest due on Coupon notes secured by mortgage on real estate	180.00
84.	(Ex. 56.)	Oct. 13, 1910.	To Indianapolis Life Insurance Company	180.00
85.	(Ex. 57.)	July 11, 1912.	Interest on mortgage as per bill attached	565.00
			Total	$1,107.70

78 EXHIBIT "D."

Bill of Particulars of Amounts Advanced and Laid Out on Account of Taxes on Marion County Farm.

Voucher No.	Date.			Amount.
76. (Ex. 58.)	October	21, 1910.	Treasurer of Marion County—redemption of Marion tax sale for taxes of 1908 and 1909	99.37
77. (Ex. 59.)	October	21, 1910.	To Treasurer of Marion County—redemption of Marion tax sale for taxes 1908 and 1909.....	59.14
78. (Ex. 60.)	April	21, 1911.	To Treasurer of Marion County for taxes first half of 1910..	11.60
79. (Ex. 61.)			Treasurer of Marion County. first half of taxes 1910.....	27.84
80. (Ex. 62.)	November	1, 1912.	To treasurer of Marion County redemption of tax sale for taxes second half 1910 and 1911	92.10
81. (Ex. 63.)	November	1, 1912.	To treasurer of Marion County for taxes for year 1911.....	27.36
			Total	$317.41

79 EXHIBIT "D."

Bill of Particulars of Amounts Advanced and Laid Out on Account of Taxes on Hamilton County Farm.

Voucher No.	Date.			Amount.
50. (Ex. 63.)	May	8th, 1910.	To treasurer of Hamilton Co. in full for first installment of taxes for 1909.....	75.53
54. (Ex. 64.)	October	14, 1910.	To treasurer of Hamilton County on account of second half of taxes for 1909.....	64.33
58. (Ex. 65.)	May	1st, 1911.	To Treasurer of Hamilton County for taxes for first installment 1910.....	159.34
70. (Ex. 66.)	November	12, 1912.	To Treasurer of Hamilton County for taxes delinquent for years 1910 and 1911.....	444.34
			Total	$741.54

80 EXHIBIT "D."

Bill of Particulars of Miscellaneous Amounts Advanced and Laid Out on Account of Expenses Incurred in Protecting and Preserving Cross-plaintiff's Title and Interest and Estate of Dora E. Rooker in Hamilton County.

Voucher No.		Date.			Amount.
44.	(Ex. 67.)	June	10-'10.	L. D. Tel. Calls to Rooker.....	1.50
48.	(Ex. 68.)	July	14-'10.	" " "	.30
52.	(Ex. 69.)	October	4, 1910.	Voucher of Trust Co. to pay bill of the Hamilton Trust Co. dated April 9, 1910 for abstract work in reference to the Hamilton Co. farm, being continuation showing liens, judgments, etc.....	1.50
55.	(Ex. 70.)	November	19, 1910.	Telephone call to Rooker.....	.15
57.	(Ex. 71.)	December	28, 1911.	Trust Company payment of abstract bill for continuing abstract of Rooker farm.....	2.50
61.	(Ex. 72.)	June	23, 1911.	Voucher of Trust Company for long distance telephone call..	.15
64.	(Ex. 73.)	December	20, 1911.	Voucher of Trust Company for abstract of Hamilton Co. date November 24, 1911 continuation of abstract of title for Rooker farm.....	2.50
67.	(Ex. 74.)	June	22, 1912.	For continuation of abstract of Dora E. Rooker to Hamilton Trust Company.....	2.00
68.	(Ex. 75.)			Expenses of Henry Seyfried, Attorney in going to Noblesville	2.50
72.	(Ex. 76.)	November	25, 1912.	Kane and Kane for legal services in law suit against Dora E. Rooker, et al.....	50.00
81					
74.	(Ex. 77.)	Mar.	19, '13.	Henry Seyfried for legal services in various law suits and litigations against Dora E. Rooker, et al.....	100.00
75.	(Ex. 78.)	Mar.	19, 1913.	To Hamilton Trust Co. for continuation of abstract on Hamilton County lands.....	6.00
				Total	$169.20

EXHIBIT "D."

Bill of Particulars of Amounts Advanced and Laid Out in Showing and Advertising and Continuing Abstract of Marion County Farm.

Voucher No.		Date.		Amount.
86	(Ex. 79.)	May	17, 1911. Automobile hire to Marion Co. farm and return.....	5.00
87	(Ex. 80.)	May	29, 1911. Automobile hire to Marion Co. farm and return.....	5.00
88	(Ex. 81.)	June	17, 1911. Advertisement of Marion County farm in Indiana Catholic	4.90
89	(Ex. 82.)	August	14, 1911. Advertising in News and Star 26 and 28 respectively.....	.54
90	(Ex. 83.)	December	8, 1911 Continuation of Rooker abstract	3.50
91	(Ex. 84.)	March	19, 1913. To W. M. Coval and Sons for continuation of abstract.....	2.50
			Total	$21.44

8

EXHIBIT "D."

Bill of Particulars Showing Amounts Due on Account of Interest, Agreed 2% Commission, and Recording Instruments.

Voucher No.		Date.			Amount.
72	(Ex. 85.)	October	16, 1909. For Trustee fee.....	$150.00	
			Commission on $6,000.00	120.00	
			Attorney fee.....	25.00	
			Insurance $6,000 at 1% and 2%	95.00	
			Recording deed Hamilton Co.....	1.70	
			Recording deed Marion County	1.50	
					$393.20
		May	27, 1910. 2% commission on advancements as per trust agreement		104.93
		May	27, 1910. Interest to June 1, 1910 as per trust agreement:		
			Hamilton County.	$266.74	
			Marion County....	5.74	
					272.48
		November	29th, 1910. Interest and commissioner to Dec. 1, 1910 as per trust agreement Hamilton County	467.52	
			Marion County.....	16.78	
					484.30

Bill of Particulars Showing Amounts Due on Account of Interest, Agreed %, Commission, and Recording Instruments.—Continued.

Voucher No.	Date.			Amount.
83	May	29th, 1911.	Interest and commission to June 1, 1911 as per trust agreement:	
			Hamilton Co..... $473.11	
			Marion Co..... 15.73	
				488.84
	November	27th, 1911.	Interest as per trust agreement:	
			Ham. Co..... $491.71	
			Marion County.... 16.05	
				507.76
	May	23, 1912.	Interest as per trust agreement:	
			Hamilton County..... $515.16	
			Marion County.... 20.62	
				535.78
	November	1, 1912.	Interest on Hamilton County advancements	546.77
			Interest on Marion County advancement	25.49
	Nov.	1, 1912.	Total	$3,359.35
	Oct.	26th, 1909.	Credit by return premium on Policy No. 51341 Alliance Insurance Company of Philadelphia	95.00
			Balance	$3,264.35
			% cash paid Hamilton Trust Company	
			Continuation of abstract (Ex. 86)	6.00
	(Ex. 87.)		Taxes on Marion County real estate	42.84
	(Ex. 88.)		Taxes on Hamilton County real estate	136.20
84	(Ex. 89.)		Interest on Mortgage of American Central Life Insurance Company	426.72
	(Ex. 90.)		Interest on Mortgage of Indianapolis Life Insurance Company	622.08
	(Ex. 91.)		Amount paid on judgment of Ludivici Caledon Company...	442.42
	(Ex. 92.)		Cost to Clerk Supreme Court..	28.50
				$1,705.76

Each of the plaintiffs now files separate motions in writing to make amended cross-complaint more specific which motion reads as follows (H. I.) Said motion is now overruled by the Court, to which ruling of the Court each of the plaintiffs at the time, separately and severally objects and excepts.

Each of the plaintiffs now moves the Court to require the cross-complainant to make its amended and supplemental cross-complaint into separate paragraphs so as to each item specifically. Said motion is now overruled by the Court, to which ruling of the Court each of the plaintiffs at the time separately and severally objects and except. Each of the plaintiffs now move the Court to require the cross-complainant to paragraph the cross-complaint supplemental and amended so as to plead items by clauses. Said motion is now overruled by the court, to which ruling of the Court each of the Plaintiffs, at the time separately and severally object and except.

The plaintiffs now separately and severally move the Court to strike out the amended supplemental cross-complaint said motion is now overruled by the Court, to which ruling of the Court, each of the plaintiffs at the time separately and severally object and except. Each of the plaintiffs now file a separate and several demurrer to the amended cross-complaint in the following words and figures (H. I.). Said separate and several demurrers are now overruled by the Court to which ruling of the Court each of the plaintiffs at the time separately and severally object and except.

The said plaintiffs now file their separate and several answers, to the cross-complaint in 11 paragraphs which separate and several answers read as follows:

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY et al.

Answers of Plaintiffs, Dora E. Rooker and William V. Rooker, to Cross-complaint, Supplemented and Amended, of Fidelity Trust Company.

Dora E. Rooker and William V. Rooker for their several anwers herein to the cross complaint as supplemented and amended of Fidelity Trust Company say:

1. That they deny each and every allegation therein contained.

2. That for further and partial answer and defense as to so much of *of* said cross-complaint as seeks to recover a trustee's fee of one hundred and fifty dollars and a commission of two per cent together with interest at six per cent computed semi-annually, together with attorney's fees and other expenses as set

forth in said cross complaint for the term of one year for, and during which term said contract was to be executory these plaintiffs say said compensation is unlawful and usurious for that said obligation on the part of these plaintiffs was, as more particularly appears from said trust agreement a copy of which marked "Exhibit A" is filed with the complaint herein, ever upon the express conditions towit:

A. Said trust company promised and agreed in consideration for said compensation to furnish the moneys and means with which to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences, all to be duly completed and installed, and to furnish the moneys and means necessary to the true and better and complete performance of said contract of trust and to the successful maintenance of and care for said real estate and the business thereon conducted.

B. Said Trust Company promises and agreed to obtain from other banks and bankers upon the promissory notes of said Dora E. Rooker such sum or sums of money over and above the sum said Trust Company was to furnish out of its moneys and means, as should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper
87 structures, and to equip the same with modern utilities and conveniences all to be duly completed and installed; and to that end said Trust Company obligated itself and it became and was its duty to protect the credit of said Dora E. Rooker generally and particularly at banks.

C. Said Trust Company obligated itself and it became and was its duty to protect said real estate and said trust against waste and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and against said property.

D. That said Trust Company obligated itself to begin at the expiration of one year to reduce said trust estate to cash and to liquidate said trust in the form and manner prescribed in said contract, and

E. Said Trust Company obligated itself to strict fidelity to and toward the said Dora E. Rooker and William V. Rooker all to the end that the interest of said trust estate would thereby be the better conserved and said trust the more prudently and advantageously administered.

Yet notwithstanding the said duties and obligation of said Trust Company, which it was to do and perform in consideration of and as its compensation to said Dora E. and William V. Rooker for said rates, fees, commission and charges, said Trust Company failed neglected and refused to furnish the moneys and means with which to complete said dwelling house and outbuildings appur-
88 tenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences,

the same to be duly completed and installed, and said Trust Company failed, neglected and refused to furnish the moneys and means necessary to the true and better and complete performance of said contract of trust and to the successful maintenance of and care for said real estate and the business thereof conducted.

That said Trust Company failed, neglected and refused to obtain money from other banks and bankers upon the promissory notes of said Dora E. Rooker and failed, neglected and refused to protect and preserve the credit at bank of said Dora E. Rooker to the end that she might obtain such sum or sums of money over and above the sum said Trust Company was to furnish out of its moneys and means as should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, so that the same should be duly completed and installed; but on the contrary, said Trust Company persistently baffled and annoyed such banks, as the said Dora E. Rooker had theretofore satisfactorily done business with, and thereby said Trust Company greatly impaired and wholly destroyed the credit of said Dora E. Rooker at said banks.

That said Trust Company wholly failed, neglected and refused to protect said real estate and said trust estate against waste, and to pay promptly upon the written order and direction of said
89 Dora E. Rooker all indebtedness within the terms of said contract and against said property; but, on the contrary, said Trust Company allowed taxes on said real estate to become delinquent, and allowed said property to go without insurance, and refused to pay the written orders of said Dora E. Rooker for sums justly due to claimants against said trust estate, and caused and procured said claimants to file notices of mechanic liens against said trust estate, and to sue thereon and reduce the same to judgment with attorneys' fees and costs, and to assign such judgments to said Trust Company.

That said Trust Company wholly neglected, failed and refused to begin at the expiration of one year to reduce said trust estate to cash and liquidate said trust in the form and manner prescribed in said contract; but on the contrary, said Trust Company repudiated its said duties of fidelity and trust, and gave to these plaintiffs, notice in writing of such repudiation a copy of which marked "Exhibit No. 1" is filed with the complaint herein, that said Trust Company tendered back said estate grossly wasted and heavily encumbered and thereafter demanded that these plaintiffs pay forthwith in money the demands of said trust Company as a mortgagee; that said notice of repudiation of said trust was served on these plaintiffs before the bringing of this suit.

That by reason of the premises said Trust Company has forfeited and waived the consideration upon which it might lawfully
90 demand the collection of the interest, rates, commission, fees and charges mentioned in said trust agreement and by reason thereof said compensation which it now demands is unjust, usurious and unlawful.

Wherefore plaintiffs pray judgment that in any decree made and entered herein that no interest in excess of six per cent per annum be computed in favor of any payment made by said Trust Company upon its said demand, and they pray for all proper relief.

3. That for further and partial answer and for defense to so much of said cross-complaint as seeks to recover taxes paid, these plaintiffs say that said claim should be disallowed in the form and manner as presented in said cross-complaint, and that they should be made the subject of an accounting by the court, and that each of said items should be reduced at least twenty per cent for the reason that the obligations of these plaintiffs to repay such sums as such Trust Company might and should lay out and expend for taxes was an obligation ever upon the condition that such expenditure should be made by said Trust Company to perform and the better to perform the trust created in and by its certain contract dated October 11th, 1909, a copy of which contract marked "Exhibit A" is filed with the complaint herein; that the trust created by said contract was one calling for diligence and fidelity on the part of said Trust Company; that said Trust Company wrongfully disregarded its duty in the premises and for purposes of its own failed and refused to pay such
91 taxes before the same became delinquent and penalties were imposed thereon; that each of said items is because of said delinquency excessive in the sum and amount of twenty per cent; that such delinquency was not the fault of or delinquency of these plaintiffs, or either of them, but was solely the fault and delinquency of said Trust Company and an act of abuse and maladministration on its part of said trust for which these defendants are in nowise responsible, and for which said trust estate should not be held liable.

Wherefore, these plaintiffs pray judgment that an accounting be had and taken of said taxes paid, and that in any allowance made to said trust Company on account of said taxes paid that only such principal sums be allowed as were the principal sums of said taxes before delinquency and before penalties were attached thereto, and plaintiffs pray for all proper relief.

4. That for further and partial answer and for defense to so much of said cross complaint as seeks to recover interest paid on prior mortgage liens to the Indianapolis Life Insurance Company and to the American Central Life Insurance Company, these plaintiffs say that said claims should be disallowed in the form and manner as presented, and that an accounting should be had with respect thereto and that upon such accounting only such principal amount should be allowed as was the principal sum of such interest debt before default and delinquency; that there was a default and delinquency in the payment of such interest charges and thereupon penalties were attached in the manner and form of eight per cent interest;
92 that such penalties are not nor were they ever the debt or default of these plaintiffs or either of them, but such penalties were the debt and default of said Trust Company for that the obligation of these plaintiffs to repay such sums as said Trust Company might and should lay out and expend in interest on said prior mort-

gage liens was an obligation ever upon the condition that such expenditure should be made by said Trust Company to perform and the better to perform the trust created in and by the contract of said Company and these plaintiffs dated October 11, 1909, a copy of which contract, marked "Exhibit A" is filed with the complaint herein; that said trust was one calling for diligence and fidelity on the part of said Trust Company; that said Trust Company wrongfully disregarded its duties in the premises and for purposes of its own failed and refused to pay such interest charges before the same became delinquent, and penalties were imposed thereon; that each of said items is because of such delinquency excessive in the sum and amount of two per cent; that such delinquency was not the fault or delinquency of these plaintiffs or either of them, but was solely the fault and delinquency of the Trust Company and an act of abuse and maladministration on its part of said trust estate for which these plaintiffs are in nowise responsible, and for which said trust estate should not be held liable.

Wherefore, these plaintiffs pray judgment that an accounting be had and taken of said interest charges paid, and that in any allowance made to said Trust Company on account of interest
93 charges paid that only such principal sums be allowed as were the principal sums of such interest charges before delinquency and before penalties were attached thereto, and plaintiffs pray for all proper relief.

5. That for further and partial answer and for defense to so much of said cross complaint as seeks to recover the principal sum of Four Hundred Dollars ($400.00) designated in said cross complaint as Voucher 33, April 9, 1910, George W. Keyser upon the written order of Dora E. Rooker on account of plumbing done in the building of the residence on the lands of said Dora E. Rooker, these plaintiffs say that said claim should be disallowed for the reason that the obligation to these plaintiffs to repay such sums as said Trust Company may have paid said Keyser was an obligation ever upon the condition that such expenditure should be made by said Trust Company to perform, and the better to perform, the trust created in any by said contract of said Trust Company with these plaintiffs dated October 11, 1909, a copy of which contract, marked Exhibit A, is filed with the Complaint herein; that in and by said contract it was the duty of said Trust Company to furnish upon the written order of said Dora E. Rooker moneys with which to perform and the better to perform the trust created in and by said contract, and which trust was one calling for fidelity on the part of said Trust Company in aiding and assisting said Dora E. Rooker to erect and construct the dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences in the completion and installation thereof; that said Dora E.
94 Rooker had theretofore duly entered into a contract in writing with said George W. Keyser to furnish all labor, material and fixtures for the plumbing work and sew-age system of her

said dwelling house, all at an agreed price of Nine Hundred and Eighty Eight dollars; for which said Dora E. Rooker agreed to pay said Keyser in installments; that after said Keyser had purchased his unfitted and unmade material, and a part thereof had been delivered on the premises of the said Dora E. Rooker for use in the premises, and after said Keyser had done a small amount of the work of laying pipe and making fittings it became and was the duty of said Dora E. Rooker to issue to said Keyser her written order upon said Trust Company in the sum of Four Hundred Dollars, ($400.00) and in part performance of her said contract with said Keyser; that said Dora E. Rooker did in good faith execute her said order to said Keyser and said Keyser in good faith accepted said order; that said Trust Company without right and wrongfully in disregard of its duties and in violation of the rights of the said Dora E. Rooker, refused to pay said order or any part thereof, but compelled the said Keyser to employ attorneys at great expense to enforce the collection of such order; that said Keyser did employ such attorneys to enforce the collection of such order; that thereupon said Trust Company wrongfully prevailed upon and induced said Keyser to abandon his said contract with the said Dora E. Rooker to furnish all labor, material and fixtures for the plumbing work and the water and sewage of her said dwelling house, and said Trust Company further wrongfully prevailed upon and induced said Keyser to file a notice of his intention to hold a mechanics lien against the said premises of said Dora E. Rooker for said work and labor
95 done and material furnished, and said Keyser did file such notice of his intention to hold a lien, in the office of the Recorder of said Hamilton County, Indiana; and said Trust Company thereupon wrongfully prevailed upon said Keyser to assign said pretended lien and said builders' contract to said trust company and thereupon Keyser and said Trust Company wholly and finally abandoned said contract and the performance thereof, and that by reason of the premises said dwelling house instead of being equipped with modern conveniences and utilities completed and installed, contains only a few disconnected and broken lot articles of plumber's materials and supplies, and the same are wholly useless to said dwelling house and are of no value therein; that soon thereafter the said Keyser departed this life; that by reason of the said wrongful acts of said Trust Company, the said Dora E. Rooker was obstructed in her right and prevented by said Trust Company from enforcing her said contract against said Keyser and said plumbing work became and is incomplete, disconnected and useless to the damage of said Dora E. Rooker Fifteen Hundred Dollars ($1,500.00).

Wherefore plaintiffs demand judgment and they ask that said item of Four hundred Dollars ($400.00) be wholly disregarded and they ask for all proper relief.

6. That for further and partial answer and for defense to so much of said cross-complaint as seeks to recover the principal sum of one hundred and eighty-four dollars and 50/100 ($184.50)

designated in said cross complaint as Voucher 34 April 12, 1910 Lacy Seed and Hay Company upon the written order of Dora E. Rooker for seed purchased to be used on the farm of said
96 Dora E. Rooker these plaintiffs say that said claim should be disallowed for the reason that the obligation of these plaintiffs to repay such sums as said Trust Company might and should pay out on said order of said Dora E. Rooker was an obligation ever upon the condition that said expenditure should be made by said Trust Company to perform, and the better to perform, the trust created in and by said contract by said Trust Company with these plaintiffs, dated October 11, 1909, a copy of which contract marked "Exhibit A" is filed with the complaint herein; that said contract for the performance of said trust was a contract calling for fidelity and diligence on the part of said Trust Company in aiding and assisting the said Dora E. Rooker to meet her obligations and to accomplish the true and better and complete performance of said trust agreement, and to the successful maintenance of and care for said real estate and the business thereon conducted; that said voucher was given in payment for said oats; that in March prior to the issuance of said voucher these plaintiffs duly notified said Trust Company of their purpose and of the advisability of seeding to oats twenty acres of said trust lands situate in Marion County, and that these plaintiffs had neither the seed oats nor the available moneys with which to purchase such seed oats; that thereupon said Trust Company consented and agreed to honor and pay a voucher for said seed oats duly upon presentation; that thereupon these plaintiffs at a cost and expense of to-wit One Hundred Dollars ($100.00) caused and procured twenty acres of said land to be
97 broken and prepared for seeding to oats; that said work was well and seasonably done; that thereupon said Dora E. Rooker presented her said voucher to said Trust Company for the amount required to purchase said seed oats, that said Trust Company failed and refused to honor and pay said voucher for a long time, to-wit, one month; that because of such delay the proper time for seasonably seeding such oats under ordinary conditions passed; that plaintiffs desiring to save themselves the loss that would ensue from the abandonment of said field so prepared for oats, sowed the same relying upon the chances that unusual weather conditions might prove propitious for the growth of said crop; that said oats grew and matured into a sub-normal but reasonably *fair* crop, of to wit thirty bushels per acre; that upon the maturity of said crop said Trust Company in violation of the rights of these plaintiffs and in wrongful disregard of its said duties failed and refused to provide any means whatever for the harvesting of said crop; that by reason of said Trust Company's wrongful acts, said crop remained unharvested and was wholly wasted and lost, and plaintiffs were required to and did sustain and suffer loss of time, labor and expense in preparing said land for said oats crop, and they in like manner and for the same reasons sustained and suffered the loss of said land for the season all to their damage in the sum of Five Hundred Dollars, ($500.00).

Wherefore plaintiffs pray judgment and they ask that said item of one Hundred Eight-four and 50/100 dollars ($184.50) be disallowed as a claim against said trust estate, and they pray for all proper relief.

98 7. That for further and partial answer and for defense to so much of said cross complaint as seeks to recover the principal sum of Five Hundred and Five Dollars ($505.00) designated in said cross complaint as Voucher 51 August 26, 1910 Illinois Surety Company upon the written order of Dora E. Rooker to pay premium and provide indemnity to said Surety Company as surety on appeal bond in cause No. 7783 in the Appellate Court of Indiana wherein these plaintiffs were appellants and Ludowici Celadon Company, was appellee, these plaintiffs say that said claim is excessive Three Hundred Dollars ($300.00) and that an accounting should be had and taken as to such item and with respect thereto these plaintiffs aver the facts to be as follows: The principal sum of said Judgment of the Ludowici Celadon Company was — Hundred and — dollars and costs taxed at — Dollars; that said judgment was rendered in the Hamilton Circuit Court of Indiana on, to-wit, the — day of — 1910; that these plaintiffs desiring to appeal from said judgment procured said surety company to become surety on their appeal bond in the manner following, to-wit: Said Trust Company in consideration of its interests in the premises, but being by law disqualified from entering into contracts of indemnity, undertook to honor the order of the said Dora E. Rooker for the principal sum of Five Hundred and Five Dollars ($505.00) ever, however, upon the said condition that said Surety Company should not cash such order nor withdraw the funds thereby represented, from said Trust Company, but on the contrary, said Surety Company should deposit said order with said Trust Company and take a certificate of deposit in lieu of such order, and that such Surety Company should not cash certificate but should permit the same to be and remain
99 on deposit with said Trust Company, and to bear interest at the rate of four per cent per annum credited semi-annually until the proceeds thereof were *required* to pay said judgment and costs on affirmance and to liquidate and pay the costs, expense, premium and other proper charges which said Trust Company was to pay said judgment, interest and costs and account to the said Dora E. Rooker for the residue of said deposit and said surety company was thereupon to release its interest therein; that said Surety Company thereupon in performance of said agreement accepted the said written order of Dora E. Rooker, and deposited the same with said Trust Company, and took a certificate of deposit for Five Hundred Dollars ($500.00), being the full amount of said order less Five Dollars ($5.00) for the annual premium payable to said Surety Company; that said deposit remained in said Trust Company until on, to-wit, the — day of ——, 1913; that said judgment was affirmed on, to-wit, the — day of ——; that thereafter said Trust Company paid judgment and costs, but as to the residue of said deposit, said Trust Company and said Surety Company each endeavored to con-

vert and appropriate to its own use the said residue, and each failed an- refused to account to these plaintiffs, or to either of them for said residue; that thereafter said Trust Company and said Surety Company became involved in litigation over said residue and to such litigation these plaintiffs were made and they now are parties defendant; that said litigation is now pending in the Superior Court of Marion County, Indiana, as cause No. 91178, entitled Fidelity Trust Company vs. Illinois Surety Company et al; that in
100 said action said Surety Company by its cross complaint is seeking to recover against these plaintiff-, a large sum, to-wit, One Hundred dollars ($100.00) for its premiums and its attorney's fee in said action; that the default, if any there be, in the premises is the default of said Trust Company and not of these plaintiffs, and that any such judgment as may be rendered in said action on the said cross-complaint of said Surety Company should be offset against the said claim of said Trust Company in this action; that plaintiffs have been required to lay out and expend a large sum, to-wit, One Hundred Dollars ($100.00) in and about the defense of said suit; that said expense was necessarily incurred; that the same was due wholly to the said default of said Trust Company; that said Trust Company is and should be held to be liable therefor; and that an accounting should be had and taken as to the said fund and that these plaintiffs should have judgment accordingly.

Wherefore, plaintiffs pray judgment that an accounting be had and taken as to said item; that the damage of said Surety Company and the damage of these plaintiffs should all be assessed against said Trust Company and these plaintiffs pray for all proper relief.

8 That for further and partial answer and for defense to so much of said cross complaint as seeks to recover the principal sum of Five Hundred Seventy One and 21/100 dollars, ($571.21) designated in said cross-complaint as voucher 73, March 1913 Balke and Krauss Company for assignment of judgment and lien in foreclo-
101 sure against Dora E. Rooker in Hamilton Circuit Court and also to so much of said cross complaint as seeks to recover the principal sum of Fifty dollars ($50.00) designated in said cross complaint as voucher 72 November 25, 1912 Kane and Kane for legal services in law suit against Dora E. Rooker, et al. and also to so much of said cross complaint as seeks to recover the principal sum of One Hundred Dollars ($100.00) designated in said cross complaint as voucher 74 March 13, 1913, Henry Seyfried for legal services in various law suits and litigation against Dora E. Rooker et al., these plaintiffs say that said items are all a part of one and the same transaction and should be disallowed for the reason that the obligation of these plaintiffs to repay such sums as said Trust Company might and would lay out and expend with respect to said Trust estate was an obligation ever upon the condition that such expenditures should be made by said Trust Company to perform and the letter to perform the said trust created in and by said contract, which said trust was one calling for diligence and fidelity on the part of said Trust Company all as more fully appears in said

trust agreement, a copy of which, marked "Exhibit A" is filed with the complaint herein; that in and about the erection and construction of her said dwelling house, the said Dora E. Rooker became indebted to said Balke and Krauss Company in the sum of to-wit Four Hundred and Eighty Three Dollars ($483.00); that on, to-wit the — day of ——, 1912, the said Dora E. Rooker executed

102 to said Balke and Krauss Company her written order on said Trust Company to pay to said Balke and Krauss Company on demand said sum of Four Hundred and eighty-three dollars ($483.00); that said Trust Company without excuse dishonored said orders and refused to pay the same but wrongfully violating the rights of these plaintiffs and wrongfully disregarding its own duties in the premises caused and procured said Balke and Krauss Company to encumber said real estate with a notice of intention to hold a mechanic's lien on said premises and notwithstanding said Trust Company well knew that there was no defense whatever to said demand of said Balke and Krauss Company, said Trust Company caused and procured said Balke and Krauss Company to institute and prosecute to judgment an action to foreclose said lien; that said Trust Company caused and procured said Balke and Krauss Company to make the said Dora E. Rooker a party to said suit; that her attorney's fees and expenses in and about the defense of said action were reasonably worth One Hundred and fifty dollars ($150.00); that on the trial of said cause attorneys' fees as provided by statute were added in favor of said Balke and Krauss Company to the court of, to-wit; Seventy-five Dollars ($75.00); that said Trust Company employed said Kane and Kane and said Seyfried to defend said action, but their services were wholly fruitless and worthless, but nevertheless said Trust Company paid to said Kane and Kane said item of Fifty Dollars (50.00) represented in and by said voucher 72 and paid to said Seyfried said item of one Hundred Dollars ($100.00) represented in and by said voucher 74

103 and said items 72 and 74 were paid for no other services; that thereafter said Trust Company in further wrongful disregard of its own duties in the premises and in violation of the rights of these plaintiffs and seeking to speculate against the estate of said trust and seeking how it might by sale on execution and decree on said judgment circumvent the clause of sale in said trust agreement marked "Exhibit A," caused and procured said Balke and Krauss Company to execute its assignment of said judgment and lien to said Trust Company while said Balke and Krauss Company continue to hold the said Dora E. Rooker's said order for the payment of said money; that it never was any part of the obligation of these plaintiffs or of either of them to pay out of said trust estate or under said trust agreement any such claims or demands as said Trust Company might acquire either by purchase adversely to said trust estate or for the purpose of its own speculation.

Wherefore, these plaintiffs pray judgment that said items 72, 73 and 74 be wholly disallowed, and they pray for all proper relief.

9. That for further and partial answer and for defense to so much of said cross complaint as seeks to recover Forty Dollars and 64/100 ($40.64) being the sum of the following items, to-wit:

Voucher.	Date.	Subject	Amount.
44	June 10, 1910	Telephone	$1.50
48	July 14, 1910	Telephone	.40
52	October 4, 1910	Telephone	1.50
55	November 19, 1910	Telephone	.15
104			
57	December 28, 1910	Continuing Abstract	2.50
61	June 23, 1911	Telephone	.15
64	December 20th, 1911	Continuing Abstract	2.50
67	June 22, 1912	Continuing Abstract	2.00
68		Seyfried's Expense	2.50
75	March 19, 1913	Continuing Abstract	6.00
86	May 17, 1911	Automobile hire	5.00
87	May 29, 1911	Automobile hire	5.00
88	June 17, 1911	Advertising	4.90
89	August 14, 1911	Advertising	.54
90	December 8, 1911	Continuing Abstract	3.50
91	March 19, 1913	Continuing Abstract	2.50
	Total		$40.64

These plaintiffs say that said items should be wholly disallowed for the reason that as to these plaintiffs said items are wholly without consideration, and for the further reason the obligation of these plaintiffs to repay such sums as said Trust Company might and should lay out and expend was ever upon the condition that such expenditures should be limited strictly to such as should be made to perform and the better to perform a certain contract of trust evidenced by a memorandum in writing executed by these plaintiffs and said Trust Company on October 11, 1909, a copy of which memorandum marked "Exhibit A" is filed with the complaint herein; that said trust contract was one calling for competency and fidelity on the part of said Trust Company; that the said items are not nor is either of them a charge or lien against said land or an item that arises out of the preservation of said trust estate or that
105 arises out of the carrying on of the business conducted on said lands; that said items of expenditures laid out and incurred, if at all laid out and incurred, by said Trust Company in the conduct of its own affairs and in the promotion of its own interests and in the accomplishment of its own purposes.

Wherefore these plaintiffs pray judgment that said items be disallowed, and they pray for all proper relief.

10. That for further and partial answer and for defense to so much of said cross complaint as seeks to recover fifteen hundred dollars as and for attorneys' fees in this action wherein said Trust

Company seeks to have its deed declared a mortgage and foreclose
accordingly these plaintiffs say that said item should be wholl
disallowed for the reason the obligation of these plaintiffs to pa
such sums as said trust company might and should lay out and ex
pend was an obligation ever upon the conditions that such ex
penditure should be made by said Trust Company to perform and th
better to perform the trust created in and by a certain contract date
October 11, 1909, a copy of which marked Exhibit A is filed wi
the complaint herein, and which trust reposed upon mutual cov
nants and obligations; that of and among the said covenants an
obligations assumed by said Trust Company in and by said co
tracts were the obligations to be reasonably competent to perfor
the duties by it assumed and to exercise diligence and fidelity in th
performance thereof; that said Trust Company violating the righ
of those plaintiffs in the premises and wrongfully disregarding i
own duties intrusted the sale of said real estate to agent
106 servants and employees who were without experience an
wholly incompetent and thereby failing to sell said re
estate said Trust Company set about to despoil and wreck said tru
estate, all to the end that it might withdraw said real estate fro
the covenants of maintenance and sale set forth in said contract an
to that end the said Trust Company did numerous wrongful act
among them being the following to-wit: Said Trust Company fail
and refused to advance the moneys necessary for the making
the said improvements on the real estate of said Dora E. Rooker an
in the completion and installation thereof with modern utilities an
conveniences but on the contrary said Trust Company stopped th
work thereon leaving said improvements incomplete and without th
installation of modern utilities and conveniences therein, and caus
and required contractors employed by these plaintiffs on said wo
to assign their rights and interests in the premises to said Trust Co
pany and caused and required said contractors to file against sa
real estate notice of intention to hold mechanics' liens thereon; an
to maintain needless and costly litigation thereon all at the expen
of said *trust* estate, and to encumber of record needlessly the ti
of and to said real estate; and failed and refused to protect an
preserve at banks the credit of said Dora E. Rooker to the end th
she might overcome the said defaults of said trust company an
circumvent the evil effects of its said default but on the contra
said Trust Company wilfully badgered and annoyed the said ban
by falsehoods and delays and various tricks and artifices
chicanery until the credit of said trust estate and said Dora E
Rooker came into disrepute in said banks; that thereafter and b
fore the bringing of this suit said Trust Company whol
107 repudiated said trust and served notice in writing on the
plaintiffs that it would not further perform any duties wi
respect to said trust; that a copy of said notice marked Exhibit o
is filed with complaint herein; that a copy of said trust agreeme
marked Exhibit A is filed with the complaint herein.

Wherefore plaintiffs pray judgment that said claim for attorne
fees be wholly disregarded and pray for all proper relief.

11. That for further and partial answer and for defense to so much of said cross complaint as seeks the remedy of foreclosure of a certain deed and deeds as a mortgage these plaintiffs say that said deed and deeds were executed on October 11, 1909, concurrently with a certain contract creating a trust with respect to said real estate; that a copy of said contract marked Exhibit A is filed with the complaint herein; these plaintiffs say that such remedy of foreclosure should be ended to said Trust Company for the reason it is and would be a remedy at variance and in conflict with the terms and provisions of said trust agreement and to allow to said Trust Company the variance of and departure from said trust agreement would be to allow said Trust Company to take advantage of its own wrong and thereby consummate the spoilation and destruction of said Trust estate; and plaintiffs say that said Trust Company is incompetently managed and is and long has been in hard lines and bordering upon insolvency, if not wholly insolvent, and that it is seeking in and by said remedy in this cause to recoup its fortunes wrongfully at the expense and sacrifice of said trust estate and these plaintiffs say and would show unto the court herein that said
108 trust contract reposed upon mutual covenants and obligations of which on the behalf of said Trust Company were the duties following to-wit: To provide the means with which to make the certain improvem-*ius* on the said real estate of Dora E. Rooker and in the completion and installation thereof with modern utilities and conveniences and to carry on the business conducted on said real estate; and to preserve at banks the credit of said trust estate and of said Dora E. Rooker and to sell said real estate in the form and manner and upon the terms and conditions particularly described and set forth in said trust contract, and without foreclosure, that it was the duty of said Trust Company under and by said agreement to be competent and to select competent servants, agents and employees in and about the performance of said trust and to exercise skill, diligence and fidelity; that said Trust Company has wilfully violated each and every of its said trust duties, and obligations; that prior to the bringing of this suit against said Trust Company wholly repudiated said trust and served notice in writing on these plaintiffs that it would *not* longer abide by or perform the same; that a copy of said notice marked Exhibit one is filed with the complaint herein; that prior to said notice said Trust Company had stopped work on said improvements; that it had refused to furnish the funds with which to complete the same; that it had despoiled and wrecked the credit of said trust estate and said Dora E. Rooker at banks; that it had involved said trust estate in costly and needless litigation and expense; that it had acquired interests in and to said real estate that were hostile and adverse to said Dora E. Rooker.

109 Wherefore plaintiffs demand judgment and that in any decree herein the court shall deny to the *plaintiffs* the remedy of foreclosure and plaintiffs pray for all proper relief.

W. V. ROOKER.
Attorney for Plaintiffs.

110 The defendant Fidelity Trust Company now files its reply to each paragraph of Plaintiffs' answer to the cross-complaint except first paragraph of said answer which said reply is in the following words and figures towit:

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY.

Comes now the defendant Fidelity Trust Company and for its separate reply to each paragraph of the answer of the plaintiffs Dora E. Rooker and William V. Rooker to the amended cross-complaint of the plaintiff herein, except the first paragraph of said answer says that it denies each and every allegation therein contained.

HENRY SEYFRIED,
KANE & KANE,
Att'ys for Cross-complainant.

And it being shown to the satisfaction of the court by the summons issued and the return of the Sheriff endorsed thereupon which summons and Sheriff's return read as follows (H. I.). And each of the defendants Daniel I. Neher and Balke & Krauss Co. have been duly served with process more than ten days before summons was made returnable by order of Court, and said defendants each being three times loudly called in open Court, comes not but wholly make default. The deposition of George Shirts James L. Gavin and Doctor Joseph N. Bauer are now published by order of the court, and on motion of plaintiff and this cause being at issue is submitted to the Court for trial and before beginning of hearing of evidence plaintiff requests the Court for a special finding of facts and conclusions of law thereon and said request is now granted by the court and

111 this cause is continued.

And the hearing of the evidence is commenced and there not being time sufficient to conclude said evidence this cause is continued.

And afterwards towit: On the 6th day of November, 1913, being the 28th Judicial day of the October Term, 1919 of said Court, the following proceedings were had in said cause towit:

"Comes now the parties and the hearing of the evidence in this cause is resumed and there not being time sufficient in which to complete the hearing of the evidence this cause is continued until tomorrow morning at 9 o'clock A. M."

And afterwards towit: On the 7th day of November, 1913 being the 29th Judicial day of the October Term, 1913, of said court, the following proceedings were had in said cause towit:

Come now the parties and hearing of the evidence in this cause resumed and there not being time sufficient in which to complete hearing — the evidence this cause is continued until 9 O'clock M. To-morrow morning."

And afterwards towit: On the 12th day of November 1913 being 33rd judicial day of the October Term 1913 of said Court, the lowing further proceedings were had in said cause towit:

Come now the parties and the hearing of the evidence in this se is resumed, and there not being time sufficient to complete the ring of the evidence, this cause is continued until to-morrow ening at 9 O'clock A. M."

And afterwards towit: On the 13th day of November, 1913, being the 34 judicial day of the October Term, 1913, of said court, the following proceedings were had in said cause towit:

Come now the parties and the hearing of the evidence in this se is resumed and concluded and this cause is continued."

And afterwards towit: On the 13th day of December, 1913 being 60th Judicial day of the October Term 1913 of said Court, the lowing proceedings were had in said cause towit:

Come now again the parties both to the amended complaint and e amended cross-complaint in this cause, by their respective at-neys, and this cause having been heretofore submitted to the Court r trial finding, judgment and decree, without the intervention of ry, both to the amended complaint and also the amended cross-mplaint upon the issues joined as to each, and the court having w considered the evidence heretofore submitted on the trial of this se, and being fully advised in the premises, now files and enters record its special finding of facts and conclusions of law, which e in the words and figures following (H. I.). To each of the sev-al foregoing conclusions of law each of the plaintiffs William V. ooker and Dora E. Rooker now at the time separately and severally ects and excepts."

WILLIAM V. ROOKER.
GENTRY & CLOE,
CHRISTIAN & CHRISTIAN,
Attorneys for Plaintiffs.

which each of the plaintiffs William V. Rooker and Dora E. ooker, at the time severally objects and excepts. And as to each of e several foregoing conclusions of law each of the plaintiffs Wil-am V. Rooker and Dora E. Rooker at the time severally object and cepts and each of the plaintiffs William V. Rooker and Dora E. ooker now separately and severally move the Court for judgment upon the special findings and conclusions of law which mo-tion is in the words and figures following, (H. I.)

And the Court overrules the separate motion of each of the laintiffs William V. Rooker and Dora E. Rooker for judgment upon

the special finding of facts and conclusions of law to which ruling of the Court, each of the plaintiffs now at the time severally objects and excepts. Whereupon the Court now sustains the motion of the Defendant and Cross-complainant Fidelity Trust Company for judgment herein upon the special finding of facts and the conclusions of law made by the Court.

And upon the issues joined upon the Plaintiffs' amended complaint the Court now finds for the defendant Fidelity Trust Company and against the plaintiffs Dora E. Rooker and William V. Rooker and the Court further finds that the co-defendants to said amended complaint Lilly & Stalnaker, Illinois Surety Company and David I. Neher have no interest in the real estate described in the plaintiffs amended complaint herein.

And upon the issues joined upon the amended cross-complaint of the defendant Fidelity Trust Company the Court now finds for the cross-complainant Fidelity Trust Company, that the material allegations thereof are as therein alleged, and the debt owing to the said cross-complainant is unpaid; that there is now due the cross-complainant Fidelity Trust Company the sum of Twenty-three Thousand two Hundred and one Dollar- and forty-four cents ($23,201.44), that the said defendant and cross-complainant Fidelity Trust Company is entitled to a lien upon and judgment in rem for said sum of Twenty-three thousand two hundred one dollars and forty-four cents (23,201.44) against the real estate situated in Marion and Hamilton Counties Indiana, described in the amended cross-complaint herein.

114 And the court further finds that the contract and two indentures executed by the plaintiffs and set forth in the amended cross-complaint while in the form of a warranty deed are a mortgage and constitute a valid and subsisting lien in favor of the cross-complainant Fidelity Trust Company upon all the real estate situated in Hamilton County and Marion County Indiana, described in said instruments and in the amended cross-complaint herein; that said instruments were executed to secure the payment of the principal sums advanced by the cross-complainant Fidelity Trust Company together with interest and commission thereon. And the Court further finds that said advancements together with interest and commission thereon, towit: The sum of $23,201.44 found due and owing is now a valid and subsisting lien upon said real estate situated in Marion and Hamilton Counties, Indiana, and described in the amended cross-complaint herein. And that said instrument found to be mortgages ought to be foreclosed upon the lands hereinafter described and said lands or so much thereof as may be necessary should be sold with relief from valuation and appraisement laws to pay and satisfy said sum with interest from this date and the costs.

And the court also finds that the judgment of the Balke & Krauss Company against the Hamilton County real estate of the Plaintiff Dora E. Rooker which prior to the commence- of this action was assigned to cross-complainant Fidelity Trust Company was by said assignment then and there transferred to and continued in said mortgage and that said mortgage has thenceforward secured the payment

of said judgment and is now merged in the judgment rendered herein.

And upon satisfaction of the judgment herein the said Balke & Krause Company's judgment assigned to the cross-complain-
115 ant Fidelity Trust Company should be released and satisfied on the Hamilton County Circuit Court.

It is therefore considered and adjudged by the Court that the cross-complainant Fidelity Trust Company recover from and through the sale of said real estate which is hereinafter specifically described, the sum of $23,201.44 its damages assessed in rem against said real estate by the Court as aforesaid and also its costs and charges in this cause laid out and expended taxed at $— and —— cents with relief from valuation and appraisement laws. The judgment to bear interest at the rate of six per cent per annum from rendition thereof until paid.

And it is further considered ordered adjudged and decreed by the Court that the equity of redemption of the plaintiffs in and to said mortgages premises to wit: All the west half of the North half of section eighteen (18) Township Eighteen (18) North, range five (5) East, lying west of the Lake Erie & Western Railroad containing ninety-two acres more or less also the Southwest quarter of section seven (7) Township Eighteen (18) North, range five (5) East lying West of the Lake Erie & Western Railroad and East of White River containing forty-eight Acres more or less, also the Southeast Quarter of Section twelve (12) Township Eighteen (18) North, range four (4) East containing sixty acres more or less lying South and East of White River.

Also that part of the Northeast Quarter of Section thirteen (13) Township eighteen (18) North range four East, more particularly described as follows: Beginning at the Northeast corner of said section and running thence West with said section line 132 rods more or less to White River thence Southerly along said stream
116 with the meanderings thereof to a point 39.95 rods South of the north line of said section; Thence East 65.80 rods thence South 72.15 rods thence East 68.25 rods thence North 115.20 rods to the place of beginning containing seventy-five acres more or less situated in Hamilton County, Indiana. And the Southeast Quarter of the Northeast Quarter of Section 33, township seventeen (17) North, range four (4) East containing forty acres more or less.

Also the Southwest Quarter of the Northwest Quarter of Section 34, Township 17, North, Range four (4) east, containing forty acres more or less, situated in Marion County, State of Indiana, described in said mortgage, be and the same is hereby forever barred and foreclosed and that the real estate hereinbefore described and all of the rights title, interests and claims of the plaintiffs in and to the same shall be sold after duly advertising the same in like manner as lands are sold upon execution issued upon judgments at law such sale to be made with relief from valuation and appraisement laws. And that the lands hereinbefore described situated in Hamilton County, Indiana, shall be sold by the Sheriff of the County of Hamilton, in the State of Indiana, and that the lands hereinbefore described

situate in Marion County, Indiana shall be sold by the Sheriff of the County of Marion in the State of Indiana.

And it is further considered, ordered adjudged and decreed that the lands situate in Marion County, Indiana shall be first sold, and if the same shall not sell for a sufficient sum to satisfy and discharge the judgment and costs herein and then the lands situate in Hamilton County, Indiana, shall be sold such sales to be made as hereinbefore ordered.

It is further ordered, adjudged and decreed that the said
117 Marion County lands be sold subject to a prior mortgage executed in favor of the Indianapolis Life Insurance Company to secure a principal note in the sum of six thousand ($6,000.00) dollars and interest thereon, and that the Hamilton County lands be sold subject to a prior mortgage executed in favor of the American Central Life Insurance Company to secure a principal note in the sum of Fourteen thousand ($14,000.00) Dollars and interest thereon; and the proceeds arising from such sales are ordered and directed to be applied in the manner following to wit:

First. To payment of all costs accrued in this cause and the costs of said sale.

Second. To the payment of the amount due the cross-complainant Fidelity Trust Company, as found in this judgment, with interest thereon as aforesaid, the overplus if any, remaining after the payment of the foregoing judgment interests and costs to be paid by the Sheriff to the Clerk of Hamilton County Circuit Court for the use of the party lawfully authorized to receive the same.

It is further ordered by the Court, that a duly certified copy of this decree under the hand of the Clerk and seal of this court shall be sufficient authority to the Sheriff of Marion County, to execute the same, and it is further ordered by the Court that a duly certified copy of this decree under the hand of the Clerk and seal of this Court shall be sufficient authority to the Sheriff of Hamilton County to execute the same.

It is further considered, ordered adjudged and decreed by the court that the co-defendants Lilly & Stalnaker, Illinois Surety Company, recover of the Plaintiffs their costs and charges in this behalf laid out and expended taxed at $— and — cents. And that
118 the plaintiffs recover of the Defendant David I. Neher, the sum of $— their costs and charges in this behalf laid out and expended taxed at $—.

All of which is finally ordered adjudged and decreed by the Court.

And afterwards to wit: On the 31st day of December, 1913, being the 75 judicial day of the October term 1913 of said Court the following further proceedings were had to wit:

Come now the plaintiffs and file a separate and several motion to modify the judgment in the following words and figures to wit: (H. I.) Plaintiffs also file their separate and several motions for

a new trial in this cause in the following words and figures to wit: (H. I.)

And afterwards to wit: On the 4th day of March, 1914, being the 45th Judicial day of the January Term 1914, of said court the following further proceedings were had to wit:

Comes now the parties and plaintiffs file their separate and several motion to modify the judgment herein, which separate and several motions read as follows (H. I.). Said motions are now overruled by the court, to which ruling of the court each plaintiff at the time separately and severally objects and excepts.

Said Plaintiffs now file their separate and several motions for a new trial in this cause which separate and several motions reads as follows (H. I.). Said motions are now overruled by the Court, to which ruling of the Court each of the plaintiffs at the time separately and severally object and excepts.

Each plaintiff now prays an appeal of this cause to the Supreme Court. Said appeal is now granted and ninety days are given said plaintiffs in which to file all bills of exceptions.

Said plaintiffs are now ordered to file their appeal bonds in the sum of $30,000.00 and thirty days' time is given in which to
119 file said appeal bond.

Said plaintiffs now tender —— —— and —— —— as sureties which are now approved by the court.

And afterwards to wit: on the 14th day of March, 1914, being the 54- judicial day of the January Term, 1914, of said Court the following proceedings were had in said cause to wit:

Come now the plaintiffs and file their petition asking that the amount named for appeal bond be reduced which petition reads as follows (H. I.). Said petition is now overruled by the court, to which ruling of the court the plaintiffs at the time object and except.

And afterwards to wit: On the 29th day of January, 1916, being the 18th judicial day of the January Term 1916, of said Court, the Clerk of the Supreme Court of the State of Indiana, filed in the office of the Clerk of the Hamilton Circuit Court the certified opinion and mandate of said Supreme Court which reads as follows (H. I.).

And afterwards to wit: On the 27th day of June, 1917, being the 75th judicial day of the April Term, 1917 of said Court, the following further proceedings were had to wit:

Now in compliance with the certified opinion and judgment of the Supreme Court of Indiana, filed June 29th, 1916, reversing the judgment of the Court in this case the court now sustained the separate and several motions of the plaintiffs herein for a new trial, and a new trial is granted.

And comes now the defendant Fidelity Trust Company and by leave of Court, first granted files its second amended Counter-claim and plaintiffs are ruled to answer same not later than Saturday June 30th, 1917 at 9 o'clock A. M.

(The second amended Counter-claim reads as follows:)

120 STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY et al.

FIDELITY TRUST COMPANY, Cross-plaintiff.

vs.

DORA E. ROOKER and WILLIAM V. ROOKER, Cross-defendants.

Second Amended Counter Claim.

Comes now the defendant, Fidelity Trust Company, in its corporate capacity proper, and as Trustee, and by leave of Court first granted files this, its second amended cross-action, and by way of counterclaim said Fidelity Trust Company, in its corporate capacity proper and as Trustee, complains of the plaintiss and cross-defendants Dora E. Rooker and William V. Rooker and for cause of
121 action against the same says:

That heretofore to wit: On the 11th day of October, 1909 said cross-defendants Dora E. Rooker and William V. Rooker executed, acknowledged and delivered to the cross-complainant Fidelity Trust Company as Trustee, the following deed of conveyance, to wit:

"This indenture witnesseth, That Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, State of Indiana.

In consideration of $1, the receipt of which is hereby acknowledged, and other good and valuable considerations by them had, convey and warrant to the Fidelity Trust Company, of Indianapolis, Indiana, trustee, the following real estate in Hamilton County, State of Indiana, to-wit:

All the west half of the north half of section 18, township 18 north, range 5 east, lying west of the Lake Erie and Western Railroad, containing 93 acres, more or less.

Also the southwest quarter of section 7, township 18 north, range

5 east, lying west of Lake Erie and Western Railroad and East of White River, containing 48 acres, more or less.

Also the southeast quarter of section 12, township 18 north, range 4 east, containing 60 — more or less, and lying south and *each* of White River.

122 Also that part of the northeast quarter of section 13, township 18 north, range 4 east, more particularly described as follows:

Beginning at the northeast corner of said section, and running thence west with said section line 132 rods, more or less to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods, thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing 75 acres more or less.

To have and to hold said real estate, however, in trust for the use and benefit of said Dora E. Rooker, and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company in Indianapolis, Indiana, as aforesaid, to sell and convey said lands, or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker;

To Execute the proper Trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis shall convey a good and indefeasible

123 title in fee simple to such purchaser or purchasers, as fully as this grantor could herself do, and any such purchaser, or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, trustee.

And said Fidelity Trust Company of Indianapolis as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey the same free and clear of any incumbrances, or convey the same subject to any existing incumbrance. And to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this grantor, the mortgagee, and other lien holders in and to said real estate and to conserve the trust hereby created.

And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, trustee, the said Fidelity Trust Company, trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforcible by it and collectible with interest, at the rate of 6 per cent per annum, to be credited semi-annually as a debt and charge against said real estate.

This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed to the

American Central Life Insurance Company, by this grantor

124 and William V. Rooker, her husband, on November 19,

1908. Said mortgage secured the payment of a certain principal note of said grantor in the sum of $14,000.00 together with interest thereon, and recorded in mortgage record 52, page 84, in the office of the recorder of Hamilton County, Indiana.

In witness whereof, said Dora E. Rooker, and William V. Rooker, her husband, have hereunto set their hands and seals this 11th day of October, 1909.

DORA E. ROOKER.
WILLIAM V. ROOKER.

STATE OF INDIANA,
County of Marion, ss:

Before me, the undersigned, a Notary Public, personally appeared William V. Rooker and Dora E. Rooker, his wife, and acknowledged the execution of this deed. Witness my hand and Notarial seal, this 11th day of October, 1909.

WM. J. McCOY.

My commission expires July 23, 1910.

That said deed of conveyance was, on the — day of October, 1909, duly recorded in the office of the Recorder of Hamilton County, Indiana.

That on the same 11th day of October, 1909, the cross-defendants William V. Rooker and Dora E. Rooker executed, acknowl-
125 edged and delivered to the cross-complainant Fidelity Trust Company, Trustee, the following deed of conveyance, to-wit:

This indenture witnesseth, That William V. Rooker and Dora E. Rooker, husband and wife, of Hamilton County, State of Indiana, in consideration of $1, the receipt of which is hereby acknowledged and other good and valuable consideration by them had, convey and warrant to the Fidelity Trust Company of Indianapolis, Indiana, trustee, the following real estate in Marion County, Indiana, to-wit.

The southeast quarter of the northeast quarter of section 33, township 17 north, range 4 east, containing 40 acres, more or less.

Also the southwest quarter of the northwest quarter of section 34, township 17 north range 4 east, containing 40 acres, more or less.

To have and to hold said real estate however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee as aforesaid, to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one year after date
of these presents, for a consideration fixed in said contract, and
126 should it so happen that said real estate be not sold within said period of 1 year, for the sum nominated in writing, to be given to the grantors by the trustees herein, the trustee may publicly advertise said real estate and sell same at public or private

sale at such price as it may bring, and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such trustee, to execute the proper trustee's deed conveying the title thereto in fee simple to its purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchaser shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, Trustee, on this date.

The said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in
127 writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrance, or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate, and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company, of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, Trustee, shall be subrogated to all rights, title and interest held by the original parties thus paid, and the same shall be collectible and enforcible in its hands, together with interest thereon at the rate of 6 per cent. per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed March 12, 1909 by the grantors William V. Rooker and Dora E. Rooker husband and wife, to Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of $5,000 and interest coupon notes thereon, which mortgage is recorded in
128 mortgage record 523, page 128 in the office of the recorder of Marion County, State of Indiana.

In witness whereof said William V. Rooker and Dora E. Rooker have hereunto set their hands and seals, this 11th day of October, 1909.

WILLIAM V. ROOKER.
DORA E. ROOKER.

STATE OF INDIANA,
County of Marion, ss:

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared William V. Rooker and Dora E. Rooker, husband and wife, and acknowledged the execution of this deed.

Witness my hand and notarial seal, this 11th day of October, 1909.

WILLIAM J. McCOY,
Notary Public.

My commission expires July 23, 1910.

That said deed of conveyance was, on the — day of October, 1909, duly recorded in the office of the Recorder of Marion County, Indiana.

That concurrently with the execution and delivery of the hereinbefore set forth deeds of conveyance, and as part of the same transaction, the cross defendants Dora E. Rooker and William V. Rooker, and the cross-complainant Fidelity Trust Company, executed in duplicate the following memorandum, to-wit:

129 "This memorandum executed in duplicate, at the city of Indianapolis, Indiana, this 11th day of October, 1909, by and between Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, Indiana, first parties, and the Fidelity Trust Company of Indianapolis, Indiana, second party.

Witnesseth:

Par. 1. That concurrently herewith and as a part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed, conveyed to second party as Trustee, ever upon the conditions and trust and upon the powers herein and for the uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, to-wit:

The southeast quarter of the northeast quarter of section 33, township 17 north, range 4 east, containing 10 acres, more or less.

Also the southwest quarter of the northwest quarter of section 34, township 17 north, range 4 east, containing 10 acres, more or less,

Also the following real estate in Hamilton County, in the State of Indiana, to-wit:

All the west half of the north half of section 18, township 18 north, range 5 east, lying west of the Lake Erie and Western
130 Railroad containing 92 acres, more or less.

Also the southwest quarter of section 7, township 18 north, range 5 east, lying west of the Lake Erie and Western Railroad and east of White River, containing 48 acres, more or less.

Also the southeast quarter of section 12, township 18 north, range 4 east, containing 60 acres, more or less, and lying south and east of White River.

Also all that part of the northeast quarter of section 13, township 18 north, range 4 east, more particularly described as follows:

Beginning at the northeast corner of said section, and running thence west with said section line one hundred and thirty two rods, more or less to White River, thence southerly along with said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15

rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing 75 acres, more or less.

That reference is hereby made to the said warranty deed, and to the several descriptions therein for greater certainty.

Par. 2. That said warranty deed is made upon the con-
131 ditions and trust and upon the powers and for the uses and purposes herein particularly set forth, that is to say:

Whereas, the said Dora E. Rooker, the grantor in said deed and first party herein, is the owner in her own and separate right and estate of the said above described lands, situated in said Hamilton County, and the said Dora E. Rooker and William V. Rooker, her husband, grantors in said deed, and parties of the first part herein are the owners as tenants by the entireties of said real estate situate in said Marion County, and,

Whereas, the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, as heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, and in so doing has been obliged to lay out and expend large sums of money and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay, and,

Whereas, the said improvements have been carried so far toward completion as they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; and,

132 Whereas, it requires $6,000 *dollars* to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her arising out of the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of the making of said improvements.

Now therefore, it is agreed that the said Fidelity Trust Company, second party herein, shall and it does hereby accept the title of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say:

Clause A. The Fidelity Trust Company shall pay, and it does hereby agree to pay from time to time, upon the written order and directions of said Dora E. Rooker, not exceeding the sum of $6,000 for and on account of the erection and construction of said dwelling house, outbuildings and improvements and the equipment and installation thereof, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal of said Dora E. Rooker, it is ever under-
133 stood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness shall

be forever binding and conclusive on all parties concerned, that such debt or debits so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

Clause B. The said Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said Trust Company may deem necessary to protect its interest in and to said real estate and to perform or better promote the performance of the trust herein and hereby created and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as full as if the same were made upon her express written directions.

Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker, any such sum or sums of money, whether within or in excess of the sum of $6,000, as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care
134 for said real estate and the business thereon conducted.

Clause D. Said Fidelity Trust Company is hereby appointed and empowered and authorized as the true and lawful attorney in fact of the second parties and in their separate deed, joint name, place, right and stead to execute a deed of general warranty or deeds of general warranty conveying said real estate or any part or parts thereof upon the limitations hereinafter states and provided.

Par. 3. Said Fidelity Trust Company shall have and receive for its compensation Trustee's fees of one Hundred and Fifty Dollars and a commission of 2 per cent. on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with the interest on all such moneys, at the rate of six per cent. per annum, to be credited semi-annually to said Fidelity Trust Company as a debt and charge against said Dora E. Rooker and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company pursuant to this agreement; and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one eight- of one per cent. for all notes for 90 days or less for moneys obtained from any
135 bank to the credit of said Dora E. Rooker on her paper originally made.

Par. 4. It is further understood and agreed that at any time within 1 year after the date of these presents said second party may execute and perform so much of the power to sell and convey as is hereinbefore granted as pertains to said Marion County real estate, provided always that the sum received in consideration therefor shall be net to the credit of said Dora E. Rooker, $18,000 after the pay-

ment of the commission hereinbefore mentioned. Should it so happen that said Marion County real estate be not sold within said period of one year for said sum of $18,000 plus commission then, after 90 days' notice in writing to be given to first parties by second party, the said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring, and if said Marion County real estate does not sell for lack of a bid then second party may, upon 90 days' notice in writing to be given to the first parties by the second party sell and convey said Hamilton County real estate for whatever it will bring. And if said Marion County real estate upon such sale do not fetch enough to pay the moneys and perform the obligation herein charged upon and against said real estate, then said second party may proceed to sell and
136 sell the Hamilton County real estate in the manner and form prescribed as to said Marion County real estate after 30 days' notice given in writing to first parties by second party.

It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of said real estate made pursuant to this agreement as follows:

1. To the payment of any mortgage or other valid lien, charge adverse interest or incumbrance upon and against said real estate or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

2. To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties herein authorized and provided.

3. To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker, upon her paper as hereinbefore authorized and provided.

137 —. The rest and residue of any money shall be paid to the said Dora E. Rooker, her heirs executors, administrators and assigns.

5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if deed were made by the first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

Par. 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors and assigns.

In execution whereof the several prospective parties have hereunto affixed their hands and seals at the date and place first above written.

DORA E. ROOKER
WILLIAM V. ROOKER.
FIDELITY TRUST CO.,
Per W. M. FOGARTY,
Prest."

138 Said Cross-plaintiff, Fidelity Trust Company, avers that, as represented and set forth in the foregoing memorandum, the said Dora E. Rooker, was, on said 11th day of October, 1909, the owner in her own separate right and estate of said Hamilton County, Indiana, lands herein before described; and that on said date said Dora E. Rooker and William Rooker her husband, were the owners as tenants by entireties of said Marion County Indiana lands hereinbefore described; that as set forth in said deeds of conveyance the said Hamilton County lands were encumbered by a mortgage executed to the American Central Life Insurance Company to secure a principal note in the sum of Fourteen Thousand ($14,000.00) Dollars together with interest thereon at six (6) per cent per annum, payable semi-annually, and said Marion County lands were encumbered by a mortgage executed to Indianapolis Life Insurance Company to secure a principal note in the sum of Six thousand Dollars ($6,000.00) with interest at six (6) per cent per annum payable semi-annually. That as represented and set forth in the foregoing memorandum the said Dora E. Rooker had, prior to said date, undertaken to erect and construct a dwelling house and buildings appurtenant thereto, and other necessary structures upon her said Hamilton County Lands described, and in so doing had been obliged to lay out and expend large sums of money and obliged to incur obligations beyond her means to pay. That in like manner said Dora E. Rooker incurred certain obligations in operating and cultivating lands, and thereafter other charges, taxes and liens attached against

139 said Hamilton County and Marion County lands and the interest on the mortgages referred to became due and payable, and in order to protect the title to said lands described, and protect the cross-plaintiffs' interest, it became necessary to pay the same.

That as agreed said cross-plaintiff, Fidelity Trust Company, upon execution of said deeds and agreement or memorandum immediately credited said Dora E. Rooker with said sum of Six Thousand ($6,000.00) dollars and thereafter paid from time to time upon the written order and directions of said Dora E. Rooker the sum of Six Thousand ($6,000.00) dollars for and on account of the erection and construction of said dwelling house, outbuildings and improvements and installation thereof, and also paid out and expended further and additional sums of money upon the written order of said Dora E. Rooker in order to protect the title and its interest in and to said real estate as hereinafter specifically enumerated and set forth, towit:

On the 13th day of October, 1909 to the Indianapolis Mortar and Fuel Company, upon the written order of said Dora E. Rooker, for

material used in the building and improvements on said Marion County and Hamilton County lands, the sum of sixty ($60.00) dollars; October 13th 1909, to the Balke-Krause Company, upon the written order of Dora E. Rooker on account of material furnished and used in the improvements made on said lands the sum of One Thousand ($1,000.00) dollars; October 14th, 1909 to W. H. Johnson and Son, on the written order of said Dora E. Rooker for heating apparatus and fixtures placed in the house and erected
140 on said lands, the sum of four Hundred ($400.00) dollars; October 16, 1909, on the written order of Dora E. Rooker in payment of monies advanced prior thereto on notes, the sum of Three Hundred and Fifty ($350.00) dollars; October 16th, 1909 on the written order of said Dora E. Rooker in payment of monies advanced prior thereto, upon notes, the sum of Three Hundred and Seventy Five Hundredths ($300.75) dollars; October 16th, 1909 upon the written order of said Dora E. Rooker, on account of pay roll in the improvements of her lands, the sum of Three Hundred ($300.00) dollars; October 29th, 1909 on the written order of said Dora E. Rooker on account of pay rolls in the improvement of her said lands Three Hundred and Fifty ($350.00) dollars; October 22, 1909 to Pittsburg Plate Glass Company on the written order of said Dora E. Rooker on account of balance for contract for glass furnished in the house erected on her said lands, Two Hundred and Sixty Five ($265.00) Dollars; November 12th, 1909, W. R. Evans and Company, on the written order of said Dora E. Rooker for erection and construction of a stairway in said House, the sum of seventy Three ($73.00) dollars; November 17th, 1909, to Daniel Stewart, upon the written order of Dora E. Rooker, on account of paints and oils furnished in erection and construction of said dwelling house the sum of sixty Dollars and Eighty Eight ($60.88) cents; November 27th 1909 upon the written order of said Dora E. Rooker on account of pay roll and brick for improvements, the sum of One Hundred ($100.00) Dollars; November 29th, 1909 to Humphrey and Sargent, upon written order of Dora E. Rooker, on account of tin work on her said residence, the sum of Four Hundred
141 ($400.00) dollars; December 4th, 1909 upon the written order of said Dora E. Rooker on account of pay roll sundries and lime for said house, the sum of Eighty Five ($85.00) dollars; December 11th, 1909, upon the written order of said Dora E. Rooker on account of pay roll, the sum of Forty Five ($45.00) dollars; December 15th, 1909 to Western Brick Company on written order of said Dora E. Rooker for 2,000 brick furnished for said dwelling twenty ($20.00) Dollars December 18th, upon the written order of said Dora E. Rooker on account of pay roll, the sum of Twenty-five ($25.00) dollars; December 24th 1909 on written order of said Dora E. Rooker on account of pay roll the sum of Thirty Five ($35.00) Dollars; December 31, 1909 on written order of said Dora E. Rooker on account of pay roll the sum of Twenty Five ($25.00) dollars; December 31st, 1909 to Lilly and Stalnaker on account of hardware furnished for said dwelling house the sum of Three hundred ($300.00) dollars; January 4, 1910 to W. H. Johnson Son and Company in full, upon the written order of said Dora E. Rooker,

for heating system installed in said dwelling house, the sum of Four Hundred ($400.00) dollars; January 6, 1910, to W. H. Johnson and Son Company in correction of error made in final settlement for heating plant in said residence, a balance in the sum of Fifty Dollars ($50.00); January 15, 1910 on written order of Dora E. Rooker on account of weekly pay roll Thirty Five ($35.00) Dollars; January 31, 191- upon the written order of said Dora E. Rooker payment of four (4) notes theretofore already executed for loans made for labor and material in construction of her said dwelling and labor and supplies, the sum of Eight Hundred and thirty Two dollars and Fifty ($832.50) cents; January 31st, 1910,
142 on the written order of said Dora E. Rooker, on account of expenses in operating said lands, the sum of Sixty five ($65.00) dollars; February 15th, 1910, upon the written order of said Dora E. Rooker, to pay roll and carpenter work, the sum of Fifty ($50.00) Dollars; February 28th, 1910, Hetherington and Berner, upon the written order of said Dora E. Rooker, in full for structural iron work on said residence, the sum of One Hundred Eighty Two Dollars and Sixty Five ($182.65) cents; February 28th, 1910 to Steward Carey Glass Company upon the written order of said Dora E. Rooker in full for glass furnished, the sum of Two Dollars and Sixty Six ($2.66) cents; February 28th 1910 upon the written order of said Dora E. Rooker, for pay roll, the sum of forty Five ($45.00) dollars; March 31st, 1910 on the written order of said Dora E. Rooker, on account of pay roll Sixty Two Dollars and Fifty ($62.50) cents; April 7th, 1910, Leroy J. Patty, Clerk of the Hamilton Circuit Court, upon the written order of said Dora E. Rooker in payment of judgment, principal interest and costs in Cause No. 15,306 Prinell and Dulin Company, vs. Dora E. Rooker et al., on foreclosure of mechanic's lien Three Hundred Eighty Four Dollars and Sixty Three ($384.63) Cents April 9th, 1910 to George W. Kiser, upon the written order of Dora E. Rooker on account of plumbing done in residence of said Dora E. Rooker Four Hundred ($400.00) Dollars; April 12th, 1910 to the Lacy Seed and Hay Company upon the written order of said Dora E. Rooker, on account of seed purchased by her for use on her lands One Hundred Eighty Four Dollars and fifty ($184.50) cents; April 15th 1910, upon the written order of Dora E. Rooker on account of pay roll Sixty
143 Two Dollars and Fifty ($62.50) cents; April 19th, 1910 to Balke and Krauss Company, upon the written order of Dora E. Rooker, on account of material furnished for the building of her residence, Two Thousand Five Hundred Ninety Five Dollars and twenty Three ($2,595.23) cents; April 29th, 1910, upon the written order of Dora E. Rooker, on account of pay roll and maintenance of her said land, Sixty Two Dollars and Fifty ($62.50) cents, May 11th 1910, upon the written order of Dora E. Rooker, on account of pay roll Sixty Two Dollars and Fifty ($62.50) cents; May 28th, 1910, upon the written order of Dora E. Rooker on account of pay roll expended on her said lands Sixty Two Dollars and fifty ($62.50) cents; June 15th, 1910, upon the written order of Dora E. Rooker, on account of labor on house, finishing porches and pay roll, One

Hundred Forty Eight Dollars and Fifty (8148.50) cents; June 30th, 1910 on account of two weeks' pay roll, upon the written order of Dora E. Rooker, one Hundred Thirty (8130.00) dollars; June 27th, 1910, to Kane and Kane, attorneys for Daniel I. Neher plaintiff, in the suit of Neher vs. Rooker, et al., No. 15084 Hamilton County Circuit Court, upon the written order of Dora E. Rooker, in full of principal, interest and attorney's fees judgment on release of mechanic's lien in said cause Three Hundred Twenty Five (8325.00) dollars; July 15th, 1910, upon written order of Dora E. Rooker, on account of expenses in harvesting and paying for labor on her said lands Two Hundred Twenty (8220.00) dollars; August 11th, 1910 to Citizens State Bank, Noblesville, Indiana, upon written order of Dora E. Rooker in payment of three (3) promissory notes,
144 with interest, One Thousand Four Hundred Seventy Three Dollars and Seventy Six (81,473.76) cents; August 26th, 1910, to Illinois Surety Company, upon the written order of Dora E. Rooker for premium on bond and indemnity deposit to indemnify said Surety Company as surety in cause No. 7783 in Appellate Court, of Indiana, wherein William V. Rooker and Dora E. Rooker were the appellants and Ludowici Celadon Company Appellees, Five Hundred and Five (8505.00) Dollars; November 27th, 1909 to American Central Life Insurance Co., on the written order of Dora E. Rooker on account of interest on mortgage on her lands Four Hundred Twenty Dollars and Seventy Five (8420.75) cents; May 3, 1910 to American Central Life Insurance Company, upon the written order of Dora E. Rooker, on account of interest on mortgage on her lands, Four Hundred and Twenty Dollars (8420.00); November 19th, 1910 to American Central Life Insurance Company, on the written order of Dora E. Rooker on account of interest on mortgage on her lands, Four Hundred and Twenty (8420.00) dollars; May 1, 1911, to American Central Life Insurance Company on the written order of Dora E. Rooker, on account of interest on mortgage on her lands Four Hundred and Twenty (8420.00) dollars; November 19th 1911 to American Central Life Insurance Company, on the written order of Dora E. Rooker, on account of interest on mortgage on her lands Four Hundred and Twenty (8420.00) Dollars; May 19th, 1912 to American Central Life Insurance Company, on the written order of Dora E. Rooker, on account of interest on mortgage on her lands Four Hundred and Twenty (8420.00) dollars; December 10, 1910, to Indianapolis Life Insurance Company, upon the written order of Dora E. Rooker, for interest
145 on mortgage on Marion County lands one Hundred Eighty Two Dollars and Seventy (8182.70) cents; April 16th, 1910 to the Indianapolis Life Insurance Company, on the written order of Dora E. Rooker, on account of interest on mortgage on Marion County Lands — One Hundred Eighty (81,180.00) dollars; October 18th, 1909, to the Fidelity Trust Company on the written order of Dora E. Rooker, on account of trustee's fee, commission, attorney fee, insurance and recording of deeds, Three Hundred Ninety Three Dollars and Twenty (8393.20) cents; aggregating a total of Fifteen Thousand Eight Hundred and Thirteen dollars and Twenty One

($15,813.21) cents paid out and advanced by the cross-plaintiff Fidelity Trust Company, upon the written signed orders of the said Dora E. Rooker for her use and benefit.

And said cross-plaintiff says that the amounts so paid out upon the written order of said Dora E. Rooker were paid and are in fact and in law the debt of said Dora E. Rooker and were expended for her personal use and benefit and the benefit of her separate estate; a copy of which orders is filed herewith, and made part hereof as exhibits, numbered from one (1) to Fifty-two (52) inclusive.

That in said deeds of conveyance of said Hamilton and Marion County lands hereinbefore already set forth, it was provided that in the event any liens or charges against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights, title and interest of such original lien holder, and the same be collectible and enforceable in its hands, together with interest thereon at the rate of six (6) per cent. per annum to said Fidelity Trust Company,
146 and that in said memorandum heretofore already set out it was also further provided that said Fidelity Trust Company may let out any such sum or sums of money other than the sum of Six Thousand ($6,000.00) Dollars already referred to, as said Trust Company may deem necessary to protect its interest in and to said real estate. And it was further provided that every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her written direction.

And said Fidelity Trust Company now avers and shows to the court that after the execution of said deeds and memorandum, it did let out and expend for the purpose of discharging liens and charges against said real estate, and to protect its interest in and to said real estate, the following amounts, to wit:

On March 19th, 1913 to Balke Krause Company, on assignment of a judgment taken upon foreclosure of a mechanic's lien in the Hamilton County Circuit Court, the sum of Five Hundred Seventy-one Dollars and Twenty-one ($571.21) cents on October 13, 1910 to Indianapolis Life Insurance Company for interest on mortgage loan on the Marion County farm One Hundred and Eighty ($180.00) Dollars; One July 11, 1912, to the same company for interest on the same loan Five Hundred and Sixty-five ($565.00) Dollars; On November 3, 1913, to Indianapolis Life Insurance Company for interest on same loan Six Hundred Twenty-two Dollars and Eight ($622.08) cents; on July 31, 1913, to American Central Life Insurance Company for interest on loan on Hamilton County Lands Four Hundred Twenty-six Dollars and Seventy-two ($426.72) Cents; on October 21, 1910, to Treasurer of Marion County on account of taxes on Marion County farm for the
147 years 1908 and 1909 Ninety-nine Dollars and Thirty-seven ($99.37) cents; on October 21, 1910, to Treasurer of Marion County on account of taxes for 1908 and 1909 same lands, Fifty-nine Dollars and Fourteen ($59.14) cents; on April 21, 1911 to Treasurer of Marion County for taxes for first half of 1910 on

same lands Eleven Dollars and Sixty ($11.60) cents and Twenty-seven Dollars and Eighty-four ($27.84) cents; On November 1, 1912, to Treasurer of Marion County for taxes for second half of 1910 and year 1911 on the same lands Ninety-two dollars and ten ($92.10) cents; On November 1, 1912, Treasurer of Marion County, taxes for 1911 on same lands Twenty-seven Dollars and Thirty-six ($27.36) cents; On April 12, 1913, Treasurer of Marion County on account of taxes for year 1912, on said lands Forty-two Dollars and Eighty-six ($42.86) cents; on February 5, 1914, to Treasurer of Marion County, taxes for year 1913, on same lands One Hundred Twenty-three Dollars and Seventy-three ($123.73) cents on February 14, 1916, to Treasurer of Marion County on account of taxes for year 1914, on same Marion County lands Ninety-nine dollars and ninety ($99.90) cents; On October 17, 1916 to Treasurer of Marion County first installment of taxes on same lands, for the year 1915, Forty-three Dollars and seventy-five ($43.75) cents; On October 17, 1916, to Treasurer of Marion County first installment of taxes on same lands for the year 1915, Eighteen Dollars and Forty-eight ($18.48) cents; On November 15, 1916, to Treasurer of Marion County, taxes for second installment of 1915, on same lands Forty-four dollars and twenty-five ($44.25) cents; On
148 November 14, 1916, to the Treasurer of Marion County for taxes on Marion County Lands Eighteen Dollars and forty-five ($18.45) cents; on May 8, 1910 to Treasurer of Hamilton County, in full for first installment of taxes for the year 1909 on the Hamilton County lands, Seventy-three Dollars and Fifty-three ($73.53) cents. On October 11, 1910, to Treasurer of Hamilton County for second half of taxes for 1909 on the same lands sixty-four dollars and thirty-three ($64.33) cents; on May 1, 1911, Treasurer of Hamilton County for taxes for the first installment of 1910 on the same lands, One Hundred Fifty-nine dollars and thirty-four ($159.34) cents; On November 12, 1912, to Treasurer of Hamilton County, taxes for years 1910 and 1911 on same lands Four Hundred Forty-four Dollars and thirty-four ($444.34) cents; on May 13th, 1913, to Treasurer of Hamilton County for first installment of taxes for 1913, on said lands One Hundred Thirty-six Dollars and Twenty-nine ($136.29) cents; on June 30, 1916, to Treasurer of Hamilton County on account of taxes on the Hamilton County lands to that date Eight Hundred and Fifty-five Dollars and Ten ($855.10) cents; on October 17, 1916, to the Treasurer of Hamilton County, taxes for the year 1915, on Hamilton County lands Three Hundred Nineteen Dollars and Fifteen ($319.15) cents; on June 25, 1913, to Will F. Wall Clerk of the Hamilton County Circuit Court, in satisfaction of judgment, interest and costs, rendered on foreclosure of mechanics' lien in the case of Ludowoci Caledon Company vs. Dora E. Rooker et al., and affirmed in the Appellate Court, Four Hundred Forty-two dollars and Forty-two ($442.42) cents; June 30, 1913, to J. Fred France, Clerk of the
149 Appellate Court for costs on appeal in the same case Twenty-eight Dollars and seventy ($28.70) cents; on October 17, 1914, to Fidelity Trust Company Agent, on account of prem-

iums on fire insurance on the buildings on Hamilton County lands Ninety-six ($96.00) dollars; April 28th, 1916, to Fidelity Trust Company Agent, premium on fire insurance policy on Marion County lands Forty dollars and Fifty ($40.50) cents.

And said Fidelity Trust Company further avers and shows to the Court that as hereinafter set forth the cross-defendants prior to the execution and delivery of said Hamilton County deed and said memorandum hereinbefore already set out, namely, on the 19th day of November 1908 mortgaged and warranted the said Hamilton County lands to American Central Life Insurance Company of Indianapolis, Indiana to secure the payment of one principal note of Fourteen Thousand ($14,000.00) dollars payable November 19th, 1913, and ten (10) coupons or interest notes of Four Hundred and Twenty ($420.00) dollars payable in six (6) to sixty (60) months respectively after date, and executed and delivered to said American Central Life Insurance Company said principal note in the sum of Fourteen Thousand ($14,000.00) dollars payable five (5) years after date, which date is November 19th, 1908 with interest at six (6) per cent per annum from date until maturity, evidenced by said coupon interest notes mentioned and at the rate of eight (8) per cent per annum after maturity until paid, and ten (10) per cent attorneys' fees.

And said Fidelity Trust Company further avers that said mortgage was duly recorded in Mortgage Record 52, pages 84 and 85 of the records of Hamilton County, Indiana, and that the same
150 was at all times acknowledged by the cross defendant, Dora E. Rooker to be a valid lien against said Hamilton County lands, and prior and superior to the interest of said Fidelity Trust Company.

That on November 21, 1913, the Fidelity Trust Company paid to said American Central Life Insurance Company the sum of Fourteen Thousand Four Hundred and Twenty-four Dollars and fifty ($14,424.50) cents, and took from said American Central Life Insurance Company an assignment and transfer of said note, together with all unpaid interest, coupon attached, and with interest accumulated, and an assignment of the mortgage secured by said note and interest, and caused said transfer and assignment to be duly recorded in the office of the Recorder of Hamilton County, Indiana, a copy of which mortgage, notes and assignment is filed herewith, made part hereof and marked exhibit "A."

That the amounts so paid out and advanced by the cross-plaintiff, Fidelity Trust Company, on account of interest, taxes, mortgages and other liens against said lands, aggregate a total of Twenty thousand One Hundred Fifty-eight dollars and four ($20,158.04) cents.

That in order to protect its interests in and to said real estate described, it further became necessary to employ attorneys in the several actions brought against the defendant Dora E. Rooker and William V. Rooker upon foreclosure of mechanic's lien suits filed against them in the Hamilton County Circuit Court. And said

Fidelity Trust Company now avers and shows to the Court
51 that it let out and expended on account of such attorney's fees and expenses in going to Noblesville the following items, to-wit:

November 25, 1912.	To Kane and Kane attorneys		50.00
March 19th, 1913.	To Henry Seyfried attorney		100.00
	And on account of expenses to Noblesville		2.50
			$152.50

That for the continuation of abstracts of said Marion and Hamilton County lands, the cross-complainant expended the following items, to wit:

October 14, 1910.	Continuation		$1.50
December 28, 1910.	"		2.50
November 21, 1911.	"		2.50
June 22, 1912.	"		2.00
March 19, 1913.	"		6.00
December 8, 1911.	"		3.50
March 19, 1913	"		2.50
			$20.50

Said Fidelity Trust Company further, at the special instance and request of said cross-defendants, laid out and expended the following items, to wit:

June 10, 1910.	On account of long distance telephone call		$1.50
July 14th, 1910.	On account of long distance telephone call		.40
52			
November 19, 1910.	On account of long distance telephone call		.15
June 23, 1911	On account long distance telephone call		.15
May 17, 1911.	Automobile hire on account of trip to Marion Co. farm and return		5.00
May 29, 1911.	Automobile hire on account of trip to Marion Co. farm and return		5.00
June 17, 1911.	Advertisement of sale of Marion County farm		4.90
Aug 14, 1911.	Advertisement in Indpls. News and Star		.54
			$17.64

That the grand total of cash advanced, laid *our* and expended by said Fidelity Trust Company, under and pursuant to said memorandum and agreement aggregates the sum of Thirty-six Thousand One Hundred Sixty-one Dollars and Eighty-nine (836,161.89) cents.

Said Fidelity Trust Company further avers and shows to the court that under the provisions of said memorandum and agreement aforesaid, it was agreed that said Fidelity Trust Company shall receive for its compensation a commission of two (2) per cent. on all loans and advancements and on any and all monies paid out and expended by it, to protect its interest together with interest on all such monies at the rate of six (6) per cent. per annum, to be credited semi-annually to said Fidelity Trust Company as a debt and charge against said cross-defendant Dora E. Rooker.

153 That said commission at two (2) per cent. on Thirty-six Thousand One Hundred Sixty-one Dollars and Eighty-nine cents (836,161.89) amounts to 8723.24.

That the interest on said advancement calculated to April 1, 1917, at simple interest, amounts to 810,762.48.

Said cross-complaint says that all said amounts aforesaid, with accumulations of interest, remain wholly due and unpaid, and that there are no credits or set-offs against the same.

That all the aforesaid sums of money were advanced by the cross-complainant Fidelity Trust Company in its corporate capacity proper from its own separate funds, pursuant to the memorandum or agreement of trust hereinbefore set out, and upon the security of the said Hamilton and Marion County lands hereinbefore described, and were all advanced and expended for the separate use and benefit of the cross-defendant Dora E. Rooker and her own separate estate, and constitute a charge against said Hamilton and Marion County real estate and the proceeds of the sale thereof. And the cross-complainant avers that all the sums so advanced and expended, as hereinbefore set out, with interest thereon at the rate of six (6) per cent. per annum, calculated semi-annually, and a commission of two (2) per cent. on the principal sums advanced, are secured by said Hamilton and Marion County lands conveyed to the cross-complainant as Trustee by the deeds of conveyance hereinbefore set out and by the proceeds of the sale thereof, and that as to all amounts paid out to discharge the mortgage and other liens enumerated it is subrogated to all the *of the* original holders thereof; that

154 the cross-complainant, as Trustee, holds the title to said Hamilton and Marion County real estate absolutely in fee simple for the purposes of said trust, and that to provide for the repayment of all said sums so advanced and expended, as hereinbefore set forth, the cross complainant, as Trustee has given notice to the cross-defendants that ninety (90) days after the delivery thereof it will proceed to publicly advertise said Marion County real estate and sell the same in the manner pursuant to and under the authority which this cross-complainant has under said agreement. And said cross-complainant further avers and charges that if said Marion County real estate do not fetch enough to pay the monies and discharge the

obligations charged upon and against the said real estate held by the cross-complainant as Trustee, then it will be compelled to and will, to carry out said trust, proceed to sell said Hamilton County real estate as in said memorandum or agreement of trust provided to be done.

Said cross-complainant also shows to the court that the cross-defendants have, ever since the execution of said deeds and contract, retained possession of said Hamilton and Marion County lands and are now in possession thereof, and that this cross-complainant has not received and is not chargeable with any of the profits of said lands. That said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed.

That cross-complainant also is entitled to an accounting
155 and judgment.

Wherefore the cross-complainant prays for an accounting and for judgment for the amount advanced, laid out and expended, together with interest and commission and that the judgment be decreed a lien and charge against the said lands, and funds arising from the sale thereof; and that the proceeds of the sale or sales of said real estate be ordered applied as in said memorandum or agreement of trust provided, and for any and all other proper relief.

HENRY SEYFRIED,
CHARLES E. COX,
THOS. E. KANE,
Attorneys for Cross-complainant.

EXHIBIT "A."

This indenture witnesseth, That Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, in the State of Indiana, mortgage and warrant to American Central Life Insurance Company of Indianapolis, Indiana, the following described real estate in Hamilton County, in the State of Indiana, towit:

All that part of the southeast quarter of section twelve (12)
156 township eighteen (18) north, range four (4) east, lying east of White River. Also all that part of the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, more particularly described as follows, Beginning at the southwest corner of said quarter section, and run- thence east along and upon the south line of said section to the middle of the Lake Erie and Western Railroad as now located, thence following the middle of said Railroad to its intersection, with the north line of the southwest quarter of section seven (7) at a point sixty (60) rods north of the mouth of Stony Creek and sixty (60) rods north of the center of the Railroad bridge crossing said stream, thence west to the northwest corner of the said southwest quarter; thence following the course of White River, in a southerly direction to the Range line separating ranges four (4) and five (5) thence south upon said range line to the place of beginning, including all sand and gravel

deposits at the mouth of Stony Creek. Also all of the west half of the north half of section eighteen (18) township eighteen (18) north, range five (5) east lying west of the Lake Erie and Western Railroad. Also the following described part of the north-
157 east quarter of section thirteen (13) township eighteen (18) north, range four (4) east, beginning at the northeast corner thereof; run thence west with the section line one hundred thirty two (132) rods to the east bank of White River, thence southwesterly along the east bank of White River with the meanderings of said stream to a point thirty nine and ninety five Hundredths (39.95/100) rods south of the north line of said section; thence east sixty five and eighty hundredths (65-80/100) rods; thence south seventy three and fifteen hundredths rods; thence east sixty eight and twenty five hundredths (68 25/100) rods, thence north 115 62/100 rods to the place of beginning, and all rights and appurtenances thereto belonging, to the rents, issues and profits of said real estate to secure the payment when the same shall respectively become due, of one principal note of fourteen thousand and 00/100 dollars ($14,000.00) payable November 19th, 1913, and Ten (10) coupon or interest notes of Four Hundred Twenty and 00/100 dollars ($420.00) each payable in six, twelve, eighteen, twenty four, thirty, thirty-six, forty two, forty eight, fifty four and sixty months respectively, after dated.

158 All of said notes are dated November 19, 1908 bear interest at the rate of eight per cent per annum after maturity and are payable at the Indiana National Bank, Indianapolis, Indiana, with ten per cent attorney fees, without relief whatever from valuation or appraisement laws.

All of said notes are executed by Dora E. Rooker and are payable to the said Mortgagee. Privilege is granted of paying One Hundred Dollars ($100.00) or any multiple thereof on account of said principal note on any interest pay day after one year.

The said mortgagors agree that upon failure to pay any or either of said principal, coupon or interest notes at maturity, or to pay insurance, taxes or assessments, as hereinafter provided, or on failure to comply with each or any of the terms and conditions of this instrument, then all of the debt secure hereby shall become due and collectible at the option of the mortgagee; and it is expressly agreed that upon any such default said company shall be entitled to enter upon and take possession of said mortgaged premises as mortgagee, and to collect the rents, issues and profits thereof, and apply the same on the debt hereby secured, or at its election it shall thereupon be entitled as of right, to have a receiver appointed to collect the
159 rents issues and profits arising from said mortgaged premises.

The omission of said mortgagee to exercise said option upon any default as aforesaid, shall not preclude it from the exercise thereof upon any subsequent default. Notice of the exercise of said opinion in regard to any of the matters herein provided for is not requested to be given by said mortgagee, said mortgagors hereby waiving any such notice. Said mortgagors hereby agree to keep all legal

taxes charges and assessments on said premises paid, and keep fire, cyclone and lightning insurance on the buildings on said premises to the amount of Two Thousand Dollars of each kind of said insurance in a reliable Insurance company or companies, to the approval of said mortgagee, and for its benefit (as its mortgage interest may appear), such interest to *the* evidenced by a standard mortgagee clause, and to deliver all policies of insurance and renewals thereof on said buildings to said mortgagee, to be held until said mortgage debt is fully paid; and in case of failure by the mortgagors to pay such taxes, charges, or assessments, or to procure such in-
160 surance, the said mortgagee may, at its election, pay such taxes, charges and assessment and effect such insurance; and any and all sums of money so paid, with interest at the rate of eight per cent. per annum from date of payment, shall be and they are hereby made a part of the mortgagee debt hereby secured.

It is further agreed generally that said mortgagee may, at its election, advance and pay any sum of money that in its judgment may be necessary to perfect the title of said mortgaged premises in said mortgagors or to maintain such title or to preserve the security intended to be given by this mortgage, and any and all sums of money so advanced and paid, with interest at the rate of eight per cent, per annum shall be and they are hereby made a part of the mortgage debt hereby secured. The mortgagors agree to furnish to the mortgagee at each interest pay day evidence of the payment of all past due taxes and assessments.

The said mortgagors hereby expressly agree to pay all and singular the sums of money secured by this mortgage, without relief from valuation and appraisement laws of the State of Indiana, and with ten per cent attorney fees. The mortgagors also agree that
161 they will take proper care of said real estate and buildings thereon, and neither commit waste nor allow waste to be committed, and will neither do nor suffer anything to be done that will impair the value thereof or of the security hereby given, and that the agreements of the mortgagors hereinbefore recited, and the representations below made are made also for the benefit of any assignee of this mortgage and of the debt aforesaid, or of any part thereof and the mortgagors represent to the mortgagee that the title to said real estate is a good and indefeasible estate in inheritance in fee simple in the mortgagor, Dora E. Rooker. And it is further stipulated and agreed that the mortgagee may, at its option, be entitled to be subrogated to any lien or other claim paid by or with the moneys advanced and hereby secured.

In witness whereof, the mortgagors have hereunto set their hands and seals this nineteenth day of November, 1908.

[SEAL.] DORA E. ROOKER.
[SEAL.] WILLIAM V. ROOKER.

STATE OF INDIANA,
Hamilton County, ss:

162 Before me, the undersigned, a Notary Public in and for said county, the nineteenth day of November, 1908, personally appeared Dora E. Rooker and William V. Rooker, her husband, and severally acknowledged the execution of the annexed mortgage to be their voluntary act and deed.

Witness my hand and notarial seal the day and year last written.

[SEAL.] F. M. BAKER,
Notary Public.

My commission expires 5/14/09.

Indorsement on Back of Mortgage.

I certify that the within mortgage was received for record the 19th day of November A. D., 1908 at 4 o'clock P. M. and recorded in mortgage record 52 page 84-5.

E. A. MOSBAUGH,
Recorder of Hamilton County.

Number 395 $14,000.00

163 *First Mortgage Real Estate Note to American Central Life Insurance Company of Indianapolis, Indiana.*

Indianapolis, Indiana.

November 19th, 1908.

Five years after date I promise to pay to the order of American Central Life Insurance Company of Indianapolis, Indiana, Fourteen Thousand and 00/100 Dollars.

Negotiable and payable at the Indiana National Bank of Indianapolis, Indiana, with interest at the rate of (6) six per cent per annum from date until maturity, payable semi annually which is evidenced by coupon interest notes hereto attached, and with interest at the rate of eight per cent per annum after maturity until paid and ten per cent attorney fees. Value received without any relief whatever from valuation or appraisement laws of the State of Indiana. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this note.

DORA E. ROOKER.

Privilege is granted of paying one Hundred ($1,100.00) dollars or any multiple thereof on any interest pay day after one year.

Indorsement on Back.

Nov. 21, 1913.

Assigned without recourse to Fidelity Trust Company of Indianapolis.

164 AMERICAN CENTRAL LIFE INSURANCE COMPANY.
By FRANK W. MORRISON.

No. 395.

First Mortgage Real Estate note and Interest Coupons. $14,000. Due Nov. 19, 1913. Interest and principal payable at the Indiana National Bank, Indianapolis, Indiana. Interest 6% per cent payable May and November.

American Central Life Insurance Company, Indianapolis, Indiana.

$420.00. Indianapolis, Ind.,

November 19, 1908.

November 19, 1913, I promise to pay to American Central Life Insurance Company, Indianapolis, Indiana, Four hundred twenty ($420.00) dollars payable at the Indiana National Bank of Indianapolis, Ind. Value received without any relief whatever from valuation or appraisement laws of the State of Indiana, with interest at the rate of eight per cent per annum after maturity until paid, and ten per cent. attorney fees. The drawers and endorsers severally waive presentment for payment protest and notice of protest and notice of non-payment of this note.

DORA E. ROOKER.

Note No. 10 secured by Real estate Mortgage.

165 *Indorsements on Back.*

Nov. 21, 1913.

Assigned without recourse to Fidelity Trust Company of Indianapolis.

AMERICAN CENTRAL LIFE INSURANCE CO.,
By FRANK W. MORRISON,
Third Vice President.

Indianapolis, Ind.,

November 21, 1913.

For value received, the American Central Life Insurance Company a corporation of Marion County, Indiana, hereby assigns, transfers and conveys to the Fidelity Trust Company of Indianapolis, one

promissory note for Fourteen Thousand ($14,000.00) dollars, dated November 19th 1908, payable five years after date with interest at the rate of six per cent per annum, payable semi-annually, which note was signed by Dora E. Rooker of Hamilton County, Indiana, together with all unpaid interest coupons thereto attached, and the mortgage of even date securing said note and interest coupons signed by Dora E. Rooker and William V. Rooker her husband, which mortgage was recorded in Mortgage Record 52 pages 84 and 85 of the records of Hamilton County, Indiana, without recourse *and* it.

In witness whereof the American Central Life Insurance Company has caused this assignment to be executed by its proper officer and its corporate seal attached this 21st day of November 1913.

AMERICAN CENTRAL LIFE INSURANCE COMPANY,
166 By FRANK W. MORRISON,
Third Vice President.

STATE OF INDIANA,
Hamilton County, ss:

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared Frank W. Morrison to me well known to be the Third Vice President of the American Central Insurance Company, who acknowledged the execution of the above assignment to be the duly authorized act of said corporation.

[SEAL.] CHARLES B. WELLIVER,
Notary Public.

My commission expires March 13, 1917.

And the said exhibits filed with said counter claim were in the words and figures following to wit:

EXHIBIT 1.

The Fidelity Trust Company of Indianapolis to Indianapolis Motor Fuel Co.

Sept. 1909, Sold to W. V. Rooker, Noblesville, Ind. 50 lbs. Lehi Cement Paper at $1.20, $60.00.

Rec. Payment.

INDIANAPOLIS MOTOR & FUEL CO.,
By W. H. WHITTAKER,
Treas.

Approved for payment this 13th day of Oct. 1909
DORA E. ROOKER.

Indianapolis, Ind., ——— ——, 191-.

Received of The Fidelity Trust Company, on the above order of Dora E. Rooker the sum of Sixty Dollars in full settlement of the above account.

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INDIANAPOLIS MOTOR & FUEL CO.,
By W. H. WHITTAKER,
Treas.

EXHIBIT "2"

The Fidelity Trust Company of Indianapolis to Balke Krauss Co.

1909, Oct. 13, to pt. payment on contract, $1,000.00.

Approved for payment this 13th day of October, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Oct. 13", 1909.

Received of The Fidelity Trust Company, on the above order of Dora E. Rooker the sum of One Thousand Dollars in full settlement of the above account.

$1,000.00.

BALKE & KRAUSS CO.,
By H. W. SHULZ,
Treas.

EXHIBIT "3."

The Fidelity Trust Company of Indianapolis to W. H. Johnson & Son Co.

1909, Oct. 13, On contract $400.00.

Approved for payment this 14th day of October, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Oct. 14, 1909.

Received of The Fidelity Trust Company the sum of Four Hundred Dollars in full settlement of the above account.

$400.00.

W. H. JOHNSON & SON CO.
R. A. SHIRLEY,
Secy.

EXHIBIT "4."

The Fidelity Trust Company of Indianapolis to Fidelity Trust Co., Trustee for Dora E. Rooker.

1909 Oct 14, to collateral loan of W. V. Rooker, due Octo-
168 ber 10, 1909, $350.00.

Approved for payment this 16th day of October, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Oct. 16, 1909.

Received of the Fidelity Trust Company, the sum of Three Hundred Fifty Dollars in full settlement of the above account.
FIDELITY TRUST COMPANY,
By THOMAS B. PULMER,
Secretary-Treasurer.

EXHIBIT "5."

Indianapolis, Ind., Oct. 2, 1909.

Received of Fidelity Trust Company, Three Hundred Dollars, as a second advancement to the Dora E. Rooker and W. V. Rooker Trust; said first advancement being of $350.00 for which note is on deposit with said Fidelity Trust Company, each of said advancements being for the labor and material bills to the benefit of Dora E. Rooker in construction of new house.
$300.00. DORA E. ROOKER.

The Fidelity Trust Company of Indianapolis to Fidelity Trust Company, Trustee for Dora E. Rooker.

1909, Oct. 16, To Collateral Loan of Wm. V. Rooker, due Oct. 17, 1909 and interest, $300.75.

Approved for payments this 16th day of October, 1909.

Received of the Fidelity Trust Company, the sum of Three Hundred & 75 100 Dollars in full settlement of the above account.
$300.75.
FIDELITY TRUST COMPANY,
By THOMAS B. PULMER,
Sec-lary-Treasurer.

169 EXHIBIT "6."

The Fidelity Trust Company of Indianapolis to Pay Roll & Sundry Items.

1909, Oct 16, To account pay roll and sundries, $300.00.

Approved for payment this 16th day of October, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Oct. 16, 1909.

Received of the Fidelity Trust Company, the sum of Three hundred Dollars in full settlement of the above account.

300.00. DORA E. ROOKER.

Cash to W. V. R.—payroll—T. B. F.

EXHIBIT "7."

The Fidelity Trust Company of Indianapolis to Payroll & Sundries upon Receipt of W. V. Rooker.

1909, Oct. 22, To payroll & Sundries account house $350.00.

Approved for payment this 22nd day of October, 1909.

Received of the Fidelity Trust Company, on the above order of Dora E. Rooker the sum of Three Hundred Fifty and No 100 Dollars.

$—. W. V. ROOKER.

EXHIBIT "8."

The Fidelity Trust Company of Indianapolis, Trustee for Dora E. Rooker to Pittsburgh Plate Glass Co

1909, Oct. 30, To balance as per contract for glass on house, $265.00.

Approved for payment this 30th day of October, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Nov. 9, 1909.

170 Received of The Fidelity Trust Company, on the above order of Dora E. Rooker the sum of Two Hundred Sixty-Five Dollars in full settlement of the above account.

$265.00.

PITTSBURG PLATE GLASS CO.
E. T. DAMM.

EXHIBIT "9."

The Fidelity Trust Company of Indianapolis to W. R. Evans Co.

1909, Nov. 9, To erecting and constructing stairways in Mrs. Rooker's residence under Balke Krause contract $73.00.

Approved for payment this 9th day of November, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Nov. 10, 1909.

Received of The Fidelity Trust Co., the sum of Seventy Three Dollars in full settlement of the above account.

Approved for payment this 9th day of November, 1909.
$73.00.

DORA E. ROOKER.

Indianapolis, Ind., Nov. 19, 1909.

Received of The Fidelity Trust Co., the sum of Seventy three Dollars in full settlement of the above account.
$73.00.

WM. R. EVANS & CO.

EXHIBIT "10."

The Fidelity Trust Company of Indianapolis to Dora E. Rooker on Account Daniel Stewart Company, Paints, etc.

1909, Nov. 17. To account in full for paints, oils etc., furnished in the erection and construction of dwelling house, $60.88.

Approved for payment this 17th day of November, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Nov. 17, 1909.

Received of The Fidelity Trust Company, on account Dora
171 E. Rooker the sum of Sixty and 88 100 Dollars in full settlement of the above account.
$60.88.

DANIEL STEWART CO.,
Per L. H. SPAFFORD.

EXHIBIT "11."

The Fidelity Trust Company of Indianapolis, Trustee for Dora E. Rooker, to William V. Rooker.

1909, Nov. 27. To pay roll, sundry brick etc., $100.00.

Approved for payments this 27th day of November, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Nov. 28, 1909.

Received of The Fidelity Trust Company, Trustee for Dora E. Rooker the sum of One Hundred Dollars in full settlement of the above account.
$100.00.

WM. V. ROOKER.

EXHIBIT "12."

The Fidelity Trust Company of Indianapolis to Humphreys & Sargent, Contractors, for Tin Work on Dora E. Rooker's Residence.

Acct. Dora E. Rooker.

1909, Nov. 24, Acct. Tin work on residence, $400.00.

Approved for payment this 24th day of November, 1909.

——— ———.

Indianapolis, Ind., Nov. 30, 1909.

Received of The Fidelity Trust Company Trustee for Dora E. Rooker the sum of Four Hundred Dollars in full settlement of the above acc-unt.

HUMPHREYS & SARGENT.
By D. HUMPHREYS.

EXHIBIT "13."

172 The Fidelity Trust Company of Indianapolis to — Roll and Sundries, Lime, etc.

Acct. Dora E. Rooker.

1909, Dec. 4, To Farm pay roll sundries on house, lime, etc., $85.00.

Approved for payment this 4th day of December, 1909.
DORA E. ROOKER

Indianapolis, Ind., Dec. 4th, 1909.

Received of The Fidelity Trust Company, In full above item the sum of Eighty Five Dollars in full settlement of the abo-e account. $85.00.

WM. V. ROOKER.

EXHIBIT "14."

The Fidelity Trust Company of Indianapolis to Wm. V. Rooker Acct. Pay Roll on Dora E. Rooker Farm.

On Account Dora E. Rooker.

1909, Dec. 11, To farm pay roll $45.00.

Approved for payment this 10th day of December, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Dec. 10, 1909.

Received of The Fidelity Trust Company, Forty-five Dollars in full settlement of the above account, in full above item.

WM. V. ROOKER.

EXHIBIT "15."

The Fidelity Trust Company of Indianapolis.

Acct. Dora E. Rooker.

1909, Dec. 10, to 2M brick furnished for residence of Dora E. Rooker, at $10.00 per thousand, $20.00.

Approved for payment this — day of ——, 191-.

DORA E. ROOKER.

Indianapolis, Ind., Dec. 15, 1909.

173 Received of The Fidelity Trust Company, on account Dora E. Rooker the sum of Twenty Dollars in full settlement of the above account

$20.00.

WESTERN BRICK COMPANY,
By W. C. RANKIN,
Sec'y.

EXHIBIT "16."

The Fidelity Trust Company of Indianapolis to W. V. Rooker Acct. Maintenance Farm for Pay Roll.

1909, Dec. 18, to weekly pay roll farm labor, $25.00.

Approved for payment this 18th day of December, 1909.

—— ——.

Indianapolis, Ind., Dec. 18, 1909.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker the sum of Twenty-five Dollars in full settlement of the above account.

$25.00.

WM. V. ROOKER.

EXHIBIT "17."

The Fidelity Trust Company of Indianapolis to W. V. Rooker for Farm Pay Roll.

Acct. Dora E. Rooker.

1909, Dec. 24, to pay roll farm maintenance week ending Dec. 25th, $35.00.

Approved for payment this 24th day of December, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Dec. 24", 1909

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Thirty Five Dollars in full settlement of the above account.

WM. V. ROOKER.

EXHIBIT "18."

The Fidelity Trust Company of Indianapolis to W. V. Rooker, Acct. Pay Roll. Dora E. Rooker Farm.

Acct. Dora E. Rooker Trust.

174 1909, Dec. 31, to W. V. Rooker Farm pay roll ending Jan. 1st 1910, $25.00.

Approved for payment this 31st day of December, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Dec. 31", 1909.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Twenty-five Dollars in full settlement of the above account.
$25.00.

W. V. ROOKER.

EXHIBIT "19."

The Fidelity Trust Company of Indianapolis to Lilly & Stalnaker, Acct. Hardware Dora E. Rooker Residence.

1909, Dec. 31st, to Lilly Stalnaker Acct. Hardware furnished in the Dora E. Rooker residence, $300.00.

Approved for payment this 31st day of December, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Dec. 31st, 1909.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker the sum of Three Hundred Dollars in full settlement of the above account.

$300.00 on account.

LILLY & STALNAKER.
V.

EXHIBIT "20."

The Fidelity Trust Company of Indianapolis to W. H. Johnson & Son Co., Balance in Full Heating Plant Dora E. Rooker Residence.

1909, Dec. 31, to balance in full heating system Dora E. Rooker residence, $100.00.

Approved for payment this 31st day of December, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Dec. 31, 1909.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Four Hundred Dollars in full settlement of the above account.

$400.00.

W. H. JOHNSON & SON CO.
RICHARD A. SHIRLEY,
Sec'y.

175 EXHIBIT "21."

The Fidelity Trust Company of Indianapolis to W. H. Johnson & Son Co. to Correction of Error on Account Final Settlement in Full All Demands.

Account of Dora E. Rooker Trust.

1910, Jan. 6, to W. H. Johnson & Son Co. for cor-ection of error made in the final and full settlement for heating plant in the residence of Dora E. Rooker near Noblesville, Ind., $50.00.

Approved for payment this 6th day of January 1910.
DORA E. ROOKER.

Indianapolis, Ind., Jan. 6th, 1910.

Received of The Fidelity Trust Company on account Dora E. Rooker Trust the sum of Fifty Dollars in full settlement of the above account.

$50.00.

W. H. JOHNSON & SON CO.,
By RICHARD A. SHIRLEY,
Sec'y.

EXHIBIT "22."

The Fidelity Trust Company of Indianapolis to W. V. Rooker on Account Farm Pay Roll on the Dora E. Rooker —.

Account Dora E. Rooker Trust.

1910, Jan. 15, to W. V. Rooker to farm pay roll for week ending Jan. 15, 1910, $35.00.

Approved for payment this 15th day of January 1910.
DORA E. ROOKER.

Indianapolis, Ind., Jan. 15, 1910.

Received of The Fidelity Trust Company, Account Dora E. Rooker Trust the sum of Thirty-five Dollars in full settlement of the above account.
$35.00.

W. V. ROOKER.

EXHIBIT "23."

176 The Fidelity Trust Company of Indianapolis to Payment of

Certain Notes Herein Designated on Account of the Dora E. Rooker Trust.
Account Dora E. Rooker Trust.

One note $100.00 dated Nov. 6, 1909 for ninety days.
One note 507.50 dated Oct. 26, 1909, for ninety days.
One note 100.00 dated Nov. 13, 1909 for ninety days.
One note 125.00 dated Nov. 1, 1909 for nin-ty days.

Total, $832.50

The above notes represent monies paid by me for labor and material in the construction of my residence, and for labor and supplies in the maintenance and upkeep of my farm.

Approved for payment this 31st day of January 1910.
DORA E. ROOKER.

Indianapolis, Ind., —— 31st, 1910.

Received of The Fidelity Trust Company Trustee for Dora E. Rooker the sum of Eight Hundred Thirty two and 50/100 Dollars in full settlement of the above account.
$832.50.

DORA E. ROOKER,
By WILLIAM V. ROOKER,
Her Agent.

EXHIBIT "24."

The Fidelity Trust Company of Indianapolis to W. V. Rooker on Account Expenses in Operating Farm to Feb. 1, 1910.

Account Dora E. Rooker Trust.

1910, Jan. 31, to expenses operating farm to Feb. 1, 1910, $65.00.

Approved for payment this 31st day of January 1910.
DORA E. ROOKER.

Indianapolis, Ind., Jan. 31, 1910.

Received of The Fidelity Trust Company, Sixty five Dollars on account Dora E. Rooker in full settlement of the above account.
$65.00.
W. V. ROOKER.

EXHIBIT "25."

177 The Fidelity Trust Company of Indianapolis to W. V. Rooker, Account Pay Roll on Farm and for Carpenter Work on House.

Account Dora E. Rooker Trust.

1910, Feb. 16, to farm pay roll to date	$26.00
1910, Feb. 20, to carpenter work on house	24.00
	50.00

Approved for payment this 15th day of February 1910.
DORA E. ROOKER.

Indianapolis, Ind., Feb. 15th, 1910.

Received of The Fidelity Trust Company account Dora E. Rooker trust the sum of Fifty Dollars in full settlement of the above account.
$50.00.
DORA E. ROOKER,
By W. V. ROOKER,
Her Agent.

EXHIBIT "26."

The Fidelity Trust Company of Indianapolis to Hetherington & Berner, in Full Structural Iron Works on Dora E. Rooker Residence.

Acct. Dora E. Rooker Trust.

1910, Feb. 25, to Hetherington & Berner in full for structural iron work Dora E. Rooker residence, $182.65.

Approved for payment this 25th day of February 1910.

DORA E. ROOKER.

Indianapolis, Ind., Feb. 25, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of One Hundred Eighty-two and 65/100 Dollars in full settlement of the above account.

$182.65.

HETHERINGTON & BERNER,
Per RUCKER.

EXHIBIT "27."

The Fidelity Trust Company of Indianapolis to Steward-Cary Glass — in Full Balance Account for Glass Dora E. Rooker Residence.

178 Acct. Dora E. Rooker Trust.

1910, Feb. 25, to Stewart-Carey Glass Company balance in full glass furnished Dora E. Rooker residence, $2.66.

Approved for payment this 25th day of February 1910.

DORA E. ROOKER.

Indianapolis, Ind., Feb. 25, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Two and 66/100 Dollars in full settlement of the above account.

$2.66.

STEWART-CARY GLASS CO.
ALEX BARRY,
Secretary.

EXHIBIT "28."

The Fidelity Trust Company of Indianapolis to W. V. Rooker, in Full Pay Roll for Maintenance Dora E. Rooker Farm to March 1, 1910.

Acct. Dora E. Rooker Trust.

1910, Feb. 28, to pay roll for maintenance of Dora E. Rooker farm to date, $45.00.

Approved for payment this 28th day of February 1910.

DORA E. ROOKER.

Indianapolis, Ind., Feb. 28, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Forty-five Dollars in full settlement of the above account.
$45.00.

DORA E. ROOKER,
By W. V. ROOKER,
Her Agent.

EXHIBIT "29."

The Fidelity Trust Company of Indianapolis to W. V. Rooker, as Agent for Dora E. Rooker, and on Acct. of the Dora E. Rooker Trust for Farm Maintenance.

Acct. Dora E. Rooker Trust.

1910, Mar. 31. to farm pay roll for last two weeks ending
179 this date, $62.50.

Approved for payment this 31st day of March, 1910.
DORA E. ROOKER.

Indianapolis, Ind., Mar. 31, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Sixty Two and 50/100 Dollars in full settlement of the above account.
$62.50.

DORA E. ROOKER,
By W. V. ROOKER,
Her Agent.

EXHIBIT "30."

The Fidelity Trust Company of Indianapolis to Leroy J. Patty, Clerk Hamilton Circuit Court of Indiana, in payment of Prin., Interest, and Costs in Cause #15306, Prinell, etc., vs. Rooker et al.

Acct. Dora E. Rooker Trust.

1910, April 7. to Leroy J. Patty Clerk in payment principal and interest judgment in Prinell & Dulin Co. v. Dora E. Rooker on foreclosure mechanic's lien	$381.48
To costs in full in above cause	3.15
	$384.63

Approved for payment this 7th day of April, 1910.
DORA E. ROOKER.

Indianapolis, Ind., April 7, 1910.

Received of The Fidelity Trust Company, Account Dora E. Rooker Trust the sum of Three Hundred Eighty-four, and 63/100 Dollars in full settlement of the above account.
$384.63.

LEROY J. PATTY,
Clerk Hamilton C. C.

EXHIBIT "31."

The Fidelity Trust Company of Indianapolis to Geo. W. Keyser, on Acct. Plumbing on the Dora E. Rooker Residence.

Acct. Dora E. Rooker Trust.

180 1910, Feb. 24th, to George W. Keyser on account plumbing Dora E. Rooker residence, $400.00.

Approved for payment this 24th day of February, 1910.
DORA E. ROOKER.

Indianapolis, Ind., Apr. 9, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker the sum of Four Hundred Dollars.

GEO. W. KEYSER.

EXHIBIT "32."

The Fidelity Trust Company of Indianapolis, to Lacy Seed & Hay Company, Ten Days' Sight Draft for Maintenance Farm Dora E. Rooker.

Acct. Dora E. Rooker Trust.

1910, Apr. 11. to 150 Bu. seed oats at 55c per bu.....	$82.50
To 12 Bu. Clover seed at $8.50 per bu....	102.00
	$184.50

This seed to be used on the farm of Dora E. Rooker in Hamilton County, Ind.

Approved for payment this 11th day of April, 1910.
DORA E. ROOKER.

Noblesville, Ind., Apr. 11, 1910.

Received of The Fidelity Trust Company, the sum of One Hundred Eighty-four & 50/100 Dollars in full settlement of the above account.
$184.50.

LACY SEED & HAY CO.
L.

EXHIBIT "33."

The Fidelity Trust Company of Indianapolis to W. V. Rooker, for Farm Pay Roll Dora E. Rooker Farm Two Weeks Ending April 16th, 1910.

Account Dora E. Rooker Trust.

181 1910, Apr. 15. to pay roll on farm two weeks ending April 16" 1910.

Approved for payment this 15th day of April 1910.

DORA ROOKER.

Indianapolis, Ind., Apr. 15th, 1910.

Received of The Fidelity Trust Company, Account Dora E. Rooker the sum of Sixty-two & 50/100 Dollars in full settlement of the above account.

DORA E. ROOKER.
By W. V. ROOKER,
Her Agent.

EXHIBIT "34."

The Fidelity Trust Company of Indianapolis to Balke & Krauss Co. Acct. Material Furnished for Dora E. Rooker Residence Near Noblesville.

Acct. Dora E. Rooker Trust.

1910, Mar. 17. to balance on account except undelivered part of contract, $2,595.23.

Approved for payment this 18th day of April 1910.

DORA E. ROOKER.

Indianapolis, Ind., April 19, 1910.

Received of The Fidelity Trust Company, Trustee Dora E. Rooker the sum of twenty-five Hundred Ninety-five and 23/100 Dollars in full settlement of the above account.
$2,595.23.

BALKE & KRAUSE CO.,
H. W. SCHILTZ.
Treas.

EXHIBIT "35."

The Fidelity Trust Company of Indianapolis to W. V. Rooker, Agent, Account Dora E. Rooker Trust.

Account Dora E. Rooker Trust.

1910, Apr. 29, to farm pay roll, maintenance of farm for two weeks ending Apr. 30th, $62.50.

Approved for payment this 29th day of April, 1910.
DORA E. ROOKER.

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Indianapolis, Ind., Apr. 20th, 1910.

Received of The Fidelity Trust Company, Account Dora E. Rooker Trust the sum of Sixty-two and 50/100 Dollars in full settlement of the above account.
$62.50. W. V. ROOKER,
Agent.

EXHIBIT "36."

The Fidelity Trust Company of Indianapolis to Wm. V. Rooker, Agent, for Dora E. Rooker Farm Maintenance Account Dora E. Rooker Trust.

Account Dora E. Rooker Trust.

1910, May 11, to Wm. V. Rooker on account pay roll for the two weeks ending May 16th, $62.50.

Approved for payment this 11th day of May, 1910.
DORA E. ROOKER.

Indianapolis, Ind., May 11th, 1910.

Received of The Fidelity Trust Company on Account Dora E. Rooker Trust the sum of Sixty-two and 50/100 Dollars in full settlement of the above account.
$62.50. WM. V. ROOKER,
Agent.

EXHIBIT "37."

The Fidelity Trust Company of Indianapolis to W. V. Rooker, Account Pay Roll Farm Maintenance to June 1, 1910.

Dora E. Rooker Trust.

1910, May 28, to pay roll for maintenance for the two weeks ending June 1, 1910, $62.50.

Approved for payment this 28th day of May, 1910.
DORA E. ROOKER.

Indianapolis, Ind., May 28, 1919.

Received of The Fidelity Trust Company the sum of Sixty-two and 50/100 Dollars in full settlement of the above account.
$62.50.

W. V. ROOKER.

EXHIBIT "38."

183 The Fidelity Trust Company of Indianapolis, Trustee, to Dora E. Rooker Trust.

1910, June 15.	For labor on house, finishing porches....	$50.00
	Two extra men on pay roll on farm work at $18.00 each.....	36.00
	Regular pay roll.....	62.50
		148.50

Approved for payment this 15th day of June 1910.

DORA E. ROOKER.

Indianapolis, Ind., June 15, 1910.

Received of The Fidelity Trust Company the sum of One Hundred Forty-eight and 50/100 Dollars in full settlement of the above account.
$148.50.

W. V. ROOKER.

EXHIBIT "39."

The Fidelity Trust Company of Indianapolis to W. V. Rooker, in Full to Date Farm Pay Roll Account Farm Maintenance.

Acct. Dora E. Rooker Trust.

1910, June 30, to farm pay roll for the two weeks ending July 1, 1910, $130.00.

Approved for payment this 30th day of June 1910.

DORA E. ROOKER.

Indianapolis, Ind., June 30, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of One Hundred Thirty and No/100 Dollars in full settlement of the above account.
$130.00.

W. V. ROOKER.

EXHIBIT "40."

The Fidelity Trust Company of Indianapolis to Kane & Kane, Attorneys of Daniel I. Neher, Pltff. in Neher vs. Rooker et al., No. 15084, Hamilton Circuit Court.

184 Acct. Dora E. Rooker Trust.

1910, June 24, to payment in full principal, interest and attorneys' fees judgment and on release of mechanic's lien in the cause of Daniel I. Neher vs. Dora E. Rooker et al. No. 15084 in the Hamilton Circuit Court of Indiana, $325.00.

Approved for payment this 24th day of June 1910.
DORA E. ROOKER.

Indianapolis Ind., June 27th, 1910.

Received of The Fidelity Trust Company Acct. Dora E. Rooker Trust the sum of Three Hundred Five Dollars in full settlement in the above account.

KANE & KANE.

$325.00

EXHIBIT "41."

Account Dora E. Rooker Trust.

The Fidelity Trust Company of Indianapolis to W. V. Rooker, Account Harvesting Expenses and Farm Maintenance on Dora E. Rooker Farm.

1910, July 15, to expenses harvesting fifty five acres wheat and for farm labor and maintenance in full for the half month ending today, $220.00.

Approved for payment this 15th day of July, 1910.
DORA E. ROOKER.

Indianapolis, Ind., July 15, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Two Hundred twenty Dollars in full settlement of the above account.

W. V. ROOKER.

$220.00.

$881.84. Noblesville, Ind., June 22, 1909.

Thirty days after date we, or either of us, promise to pay to the order of Citizens State Bank of Noblesville, Indiana, Eight
185 Hundred Eighty-one and 84/100 Dollars, with attorney fees and interest at the rate of eight per cent per annum after

Gate, until paid. Negotiable and payable at Citizen- State Bank, of Noblesville, Indiana. Value received without any relief whatever from valuation and appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and non-payment of this note.

$200.00.

DORA E. ROOKER.

Noblesville, Ind., June 28, 1909.

In call, after date we, or either of us, promise to pay to the order of Citizens State Bank, of Noblesville, Indiana, Two Hundred Dollars, with attorney fees and interest at the rate of eight per cent per annum after maturity until paid. Negotiable and payable at Citizen- State Bank of Noblesville Indiana. Value received without any relief whatever from valuation and appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

$300.00.

DORA E. ROOKER.

Noblesville, Ind., Aug. 7, 1909.

On demand, after date we, or either of us, promise to pay to the order of Citizen- State Bank of Noblesville, Indiana, Three Hundred Dollars, with attorney fees and interest at the rate of eight per cent per annum after maturity until paid. Negotiable and payable at Citizen- State Bank of Noblesville, Indiana. Value received without received without any relief whatver from valuation and appraisement laws. The drawers and indorsers waive present-
186 ment for payment, protest and notice of protest and non-payment of this note.

DORA E. ROOKER.

EXHIBIT "42."

Account Dora E. Rooker Trust.

The Fidelity Trust Company of Indianapolis to Citizen- State Bank of Noblesville Indiana, on Account the Dora E. Booker Trust.

1910, May 11, to Citizen- State Bank of Noblesville, Ind., the promissory notes for the principal amounts with six per cent interest additional towit:

One note June 22, 1909	$881.84
One note June 28, 1909	200.00
One note Aug. 7, 1909	300.00
	1,381.84

Approved for payment this 11th day of May 1910.

DORA E. ROOKER.

Indianapolis, Ind., Aug. 11, 1910.

Received of The Fidelity Trust Company the sum of Fourteen Hundred Seventy Three, and 76/100 Dollars in full settlement of the above account.
$1,473.76.

CITIZEN STATE BANK.
V. BAKER,
Cashier.

Indianapolis, Ind., May 11, 1910.

This voucher is hereby accepted by the undersigned for payment as of 90 days from the within date, viz. Aug. 9, 1910 as agreed with Shirts and Fertig, Attorneys for the Citizen State Bank, Noblesville, Indiana.

FIDELITY TRUST COMPANY.
W. M. FOGARTY,
President.

Aug. 11, 1910.
Interest computed as follows:

	$881.84 1 yr., 50 days	$52.91
187		7.34
	$200.00 1 yr., — days	12.00
		1.47
$500.00	1 yr., 4 days	18.00
		.20
$1,381.84		91.92
	Principal	1,381.84
		1,473.76

EXHIBIT "43."

The Fidelity Trust Company of Indianapolis to Illinois Surety Co.

Account Dora E. Rooker Trust.

1910, Aug. 26, to premium on supersedeas bond in cause No. 7783 in the Appellate Court of Indiana, wherein William V. Rooker and Dora E. Rooker are Appellants and Ludowici-Celadon Co. is appellee, $5.00.

To indemnity deposit to indemnify said Surety Company as surety on said supersedias bond in the event the judgment from which said appeal is prosecuted shall be finally affirmed, $500.00.

Approved for payment this 26th day of August 1910.
DORA E. ROOKER.

Indianapolis, Ind., Aug. 26, 1910.

Received of The Fidelity Trust Company the sum of Five Hundred and Five No/100 Dollars as collateral security for indemnity bond.

ILLINOIS SURETY CO.
By H. H. WOODSMALL,
Atty. in Fact.

Indianapolis Ind., Nov. 19, 1908.

November 19, 1909, I promise to pay to the American Central Life Insurance Company, Indianapolis, Ind., Four Hundred Twenty & No/100 Dollars payable at the Indiana National Bank, of Indianapolis, Ind. Value received without any relief whatever
188 from valuation or appraisement law of the State of Indiana; with interest at the rate of Eight per cent per annum after Maturity until paid, and Ten per cent Attorney fees. The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this note.

DORA E. ROOKER.

Note No. 2, secured by Real estate Mortgage 395.
Paid Nov. 29, 1909.

AMERICAN CENTRAL LIFE.
Per HAMMER.

EXHIBIT "44."

The Fidelity Trust Company of Indianapolis to American Central Life Insurance Company.

Account Dora E. Rooker.

1909, Nov. 27.	To Interest coupon on mortgage.....	$420.00	
	To eight days interest at 8%.....	.75	
			420.75

Approved for payment this 27th day of November 1909.
DORA E. ROOKER.

Indianapolis, Ind., Nov. 29, 1909.

Received of The Fidelity Trust Company the sum of Four Hundred Twenty & 75/100 Dollars in full settlement of the above account.
$420.75.

AMERICAN LIFE INSURANCE COMPANY.
R. A. HAMMER.

EXHIBIT "45."

The Fidelity Trust Company of Indianapolis to American Central Life Ins. Co., Account Interest Coupon to Mortgage Note on Dora E. Rooker Real Estate.

Account Dora E. Rooker Trust.

1910 May, 19, To semiannual interest on mortgage on Dora E. Rooker real estate as evidenced by coupon note, $420.00.

Approved for payment this 3rd day of May, 1919.

189 DORA E ROOKER.

Indianapolis, Ind., May 21, 1910.

Received of The Fidelity Trust Company, the sum of Four Hundred Twenty and no/100 Dollars in full settlement of the above account.

$420.00

AMERICAN LIFE INSURANCE COMPANY.
EDWARD A. MEYER,
Comptroller.

EXHIBIT "46."

The Fidelity Trust Company of Indianapolis to American Central Ins. Co. Mortgage.

Account Dora E. Rooker Trust.

1910 Nov. 15, in full semi-annual installment interest on mortgage on home farm in Hamilton County, $420.00.

Approved for payment this 19th day of November, 1910.
DORA E. ROOKER.

Indianapolis, Ind., Nov. 19, 1910.

Received of The Fidelity Trust Company Dora E. Rooker the sum of Four Hundred Twenty & no/100 Dollars in full settlement of the above account.

$420.00

AMERICAN LIFE INS. CO.
GEO. E. HAMMER,
Treas.

EXHIBIT "47."

The Fidelity Trust Company of Indianapolis to American Central Life Ins. Co., Acct. Interest on Mortgage Dora E. Rooker.

Acct. Dora E. Rooker Trust.

1911, May 1, to semi-annual installment interest on mortgage loan on Hamilton County Farm, $420.00.

Approved for payment this 1st day of May 1911.
DORA E. ROOKER.

Indianapolis, Ind., June 6, 1911.

Received of The Fidelity Trust Company the sum of Four Hundred Twenty and no/100 Dollars in full settlement of the above account.
$420.00.

AMERICAN CENTRAL LIFE INS. CO.
E. R. MEYER.
Comptroller.

190 1909, Dec. 10, to Interest Coupon on Mortgage loan to Sept. 12, '09, $182.70.

(Note attached to original voucher.)

Approved for payment this 10th say of December, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Dec. 11, 1909.

Received of The Fidelity Trust Co., the sum of One Hundred Eighty-two & 70/100 Dollars in full settlement of the above account.
$182.70. INDIANAPOLIS LIFE INSURANCE CO.
Per M. WALSH.

EXHIBIT "51."

The Fidelity Trust Company of Indianapolis to Indianapolis Life Insurance Co., on Account Interest Owing From the Dora E. Rooker Trust.

Account Dora E. Rooker Trust.

1910, Apr. 16, to interest due on coupon note secured by mortgage on real estate, $180.00.

Note attached to original voucher and marked paid, signed Mr. Walsh.

Approved for payment this 16th day of April, 1910.
DORA E. ROOKER.

Indianapolis, Ind., May 10, 1910.

Received of The Fidelity Trust Company, the sum of One Hundred Eighty and no/100 Dollars in full settlement of the above account.

INDIANAPOLIS LIFE INSURANCE CO.
Per M. WALSH,
Ass't Cashier.

Indianapolis, Ind., Oct. 14, 1909.

Received of Fidelity Trust Company the sum of One & 50/100 Dollars for recording W. Deed from Wm. V. Rooker & Wife, to Fidelity Trust Company, Trustee.
$150.

HARRY P. WALLACE.

EXHIBIT "52."

191 The Fidelity Trust Company of Indianapolis, Trustee for Dora E. Rooker, to Fidelity Trust Co.

1909, Oct. 14.	To Trustee fee	$150.00
	Commission on $600.00 at 2%	120.00
	Attorney Fee	25.00
	Insurance $6,000.00 at 1% & 2%	93.00
	Recording deed Hamilton County	1.70
	Recording deed Marion County	1.50
		393.20

Approved for payment this 16th day of October, 1909.
DORA E. ROOKER.

Indianapolis, Ind., Oct. 16, 1909.

Received of The Fidelity Trust Company the sum of Three Hundred Ninety-three & 20/100 Dollars in full settlement of the above account.
$393.20.

FIDELITY TRUST COMPANY,
By THOMAS B. FULMER,
Secretary-Treas.

EXHIBIT "53."

The Fidelity Trust Company.

Indianapolis, Ind., March 17, 1913.

Pay to the Order of Balke Krause Co. $571.21 Five Hundred Seventy one Dollars 21/100 to Rooker Trust assignment of judgment.

EXHIBIT "54."

$180.00. March 12, 1909.

Eighteen mo. after date we promise to pay to the order of Indianapolis Life Ins. Co. One Hundred and Eighty Dollars and ten per cent attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis, value received without any relief from valuation or appraisement laws, with interest at eight per cent. per annum after maturity.

WILLIAM V. ROOKER.
DORA E. ROOKER.

Endorsed: Paid October 13, 1910, Indianapolis Life Ins. Co. by A. L. Portteus

192 EXHIBIT "55."

The Fidelity Trust Company of Indianapolis to Indianapolis Life Ins. Co.

Acct. Dora E. Rooker.

Interest on mortgage as per bill attached		$565.00
Bill for interest coupons for	$540.00	
Accumulated interest thereon	25	
Bills due Mar. 12th	565	

Notes attached to original receipted by A. I. Potters.
Approved for payment this 11th day of July, 1912.

FIDELITY TRUST CO.,
By J. ALBERT SMITH,
Trust Officer.

Indianapolis, Ind., July 12th, 1912.

Received of the Fidelity Trust Company the sum of Five Hundred Sixty & no/100 Dollars in full settlement of the above account. $565.00.

INDIANAPOLIS LIFE INS. CO.,
By A. H. POTTERS,
Cashier.

EXHIBIT "56."

The Fidelity Trust Company of Indianapolis to Indianapolis Life Ins. Co.

Acct. Dora. E. Rooker.

Int., note due 9/12/12	$180.00
Int. accrued to Nov. 5, 1913	16.56
Int., note due 3/12/13	180.00
Int. accrued to Nov. 5, 1913	9.36
Int., note due 9/12/13	180.00
Int. accrued to Nov. 5, 1913	2.16
Accrued interest on principal note from 9/12/13 to 11/5/13	54.00
	622.06

(Receipted notes and separate receipt attached to original.

Approved for payment this 3rd day of Nov. 1913.

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FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

Indianapolis, Ind., Nov. 3rd, 1913.

Received of the Fidelity Trust Company for and on account of Dora E. Rooker the sum of Six Hundred Twenty-two and 08/100 Dollars in full settlement of the above account.
$622.08.

INDIANAPOLIS LIFE INS. CO.,
By A. L. POTTERS,
Cash

EXHIBIT "57."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to American Central Life Ins. Co.

Semi-annual interest due 5/19/13 $420.00 and 8% interest from May 19, $6.72. $426.72.

Receipted note attached to original vouchers.

Approved for payment this 31st day of July 1913.

FIDELITY TRUST CO.,
By TIMOTHY P. SEXTON,
Asst. Sec.

Indianapolis, Ind., July 31, 1913.

Received of the Fidelity Trust Company the sum of Four Hundred Twenty-six & 72/100 Dollars in full settlement of the above account.

$426.72.

AMERICAN CENTRAL LIFE INS. CO.
EWARD A. MYERS,
Comptroller.

EXHIBIT "58."

Redemption Quietus.

County Auditor's Office.

Indianapolis, Ind., Oct. 21, 1910.

This is to certify that Wm. V. Rooker has filed in the Auditor's office of said count-, the Treasurer's receipt for ninety-nine and 12 dollars for the redemption of the following described real estate in Marion County, Indiana to wit:

Part of section or subdivision.	Sec.	Tp.	R.	Acres.
S. W. ¼ N. W. ¼	34	17	4	40

194 (Signed) F. S. FISHBACK,
Treasurer.

Receipt No. 1214.

EXHIBIT "61."

Tax Receipt.

Taxes for Year 1910.

Duplicate No. 8992. Receipt 12146.

Lawrence Township.

Treasurer's Office.

Indianapolis, Ind., —— —, 1911.

Received of Fidelity Trust Co., Trustee for the first installment of State, county and Township taxes on the following described property:

S. W. Quarter N. W. Quarter 34, 17, 4, containing 40 acres. Valuation 2,900, $27.84.

F. S. FISHBACK,
County Treasurer.

EXHIBITS "62–63."

Redemption Quietus.

County Auditor's Office.

Indianapolis, Ind., Nov. 9, 1912.

This is to certify, that Fidelity Trust Co. Tr. has filed in the Auditor's office of said county, the Treasurer's receipt for the redemption of the following described real estate in Marion County, Indiana, to wit:

S. W. ¼ N. W. ¼ Sec. — Twp. 17, R 4, 40 Acres.

Bought by Meek and Skillman on the 12th day of February 1912, and sold in the name of Fidelity Trust Co. Tr. on certificate No. 50918 for taxes of 1910 and 1911 and I hereby certify that said redemption has been entered in Sale Book No. 17, page 138. Witness my Hand and off-cial seal this 9th day of Nov. 1912.

$91.85
.25

92.10

W. T. PATTEN,
County Auditor.

EXHIBIT "63."

Washington Township.

Treasurer's Office.

Indianapolis, —— —, 1912.

195 Received of Fidelity Trust Company, Trustee, principal, penalty and costs of taxes delinquent for year 1911 on N. E. quarter 33/17/4/40 acres, net valuation 2,200.00, $27.36.

(Signed) CARL VON HAKE,
County Treasurer.

EXHIBITS "62-63."

The Fidelity Trust Company of Indianapolis to Carl Von Hake.

Wm. V. Rooker Trust.

Taxes (delinquent N. E. ¼ 33-17-4	$27.36
To Rede-m N. W. ¼ 34-17-4	92.10
	119.46

Approved for payment this 1st day of of November 1912.

FIDELITY TRUST CO.,
By JAS. G. FLAHERTY.

This voucher, when date and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Received of The Fidelity Trust Company, the sum of One Hundred Nin-teen & 46/100 Dollars in full settlement of the above account.

$19.46.

EXHIBITS "62-63."

The Fidelity Trust Company of Indianapolis to Carl Von Hake.

W. V. Rooker Trust.

Taxes delinquent N. E. ¼ 33-17-4	$27.36
To redeem N. W. ¼ 34-17-4	92.10
	119.46

Paid No. 9, 1912.

Approved for payment this 1st day of November 1912.

FIDELITY TRUST COMPANY,
By JAS. G. FLAHERTY.

This voucher, when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Company of Indianapolis.

196 Received of the Fidelity Trust Company the sum of One Hundred Nineteen and 46/100 Dollars in full settlement of the above account.

$119.46.

Paid Nov. 9, 1912.

EDMOND ZENER.

EXHIBIT "64."

Duplicate No. 4206.

Washington Township.

Treasurer- Office.

Indianapolis, 1913.

Received of Fidelity Trust Company, Trustee, for first installment of State, County and Township taxes on N. E. quarter section 33. tp. 40 acres net valuation $220.00, $14.96.

(Signed) CARL VON HAKE,
County Treasurer.

Date May 5, 1913.

Duplicate No. 9991.

Lawrence Township.

Treasurer's Office.

Indianapolis, 1913.

Received of Fidelity Trust Company, Trustee, for the first installment of State, County and Township taxes, on part of the N. W. quarter section 34, 40 acres, net valuation $3,000.00, $27.90.

——— ———.

Paid May 5, 1913.

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Treasurer Marion County.

1st half taxes year 1912, 1,496..... $42.86
1st half taxes year 1912, 2,790..... (forty-two.)

Approved for payment this 12th day of April, 1913.

FIDELITY TRUST COMPANY,
Trustee.

By J. ALBERT SMITH,
Trust Officer.

This voucher, when date and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company.

Received of the Fidelity Trust Company the sum — dollars in full settlement of the above account.

Paid May 5, 1913.

W. P. COSGROVE,
Cashier.

EXHIBIT "65."

Fidelity Trust Company.

No. 6144. Indianapolis, Ind., 2 5 1914.

Fidelity Trust Company, Indianapolis.

Pay to the order of Carl Von Hake $123.73, One Hundred Twenty-three and 73/100 Dollars. Not over One Hundred Thirty Dollars $130.00.

TIMOTHY P. SEXTON,
Asst. Secy. Treas.

Treasurer's Check.

Endorsement on Back: Pay to the order of Continental Natl. Bank Carl Von Hake, City and County Treasurer. Paid February 10, 1914. Tax certificates S. W. ¼ N. W. ¼ 34-17-4, sale of 1914 $80.52; Tax certificate S. E. ¼ N. E. ¼ 33-17-4, sale of 1914 43.21, attached.

EXHIBIT "66."

Duplicate No. 11272.

Lawrence Township.

Treasurer's Office.

Indianapolis, Ind., 1916.

Received of Fidelity Trust Co. Tr. Principal, Penalty, Interest Delinquent for the year 1914 on account of State, County, and Township, on the following described property:

Description.	Tax.
2 24-17	66.46
Adv.	.40
S. W. ¼ N. W. ¼ 34-17-4-40 acres	66.86
Costs	.50
Total	67.36

E. G. SOURBIER,
County Treas.

Duplicate No. 4644, Washington Township.

Treasurer's office, Indianapolis, Ind. 1916, Received of Fidelity Trust Co., Tr. Principal, Penalty Interest and costs.

198 Bought by Meek & Osborn on the 14th day of February 1910 and sold in the name of Wm. V. Rooker on certificate No. 48,501 for taxes of 1908 and 1909 and I hereby certify that said redemption has been entered in Sale Book Vol. 17 page 9.

Witness my hand and official seal, this 21st day of Oct. 1910.

ALBERT SAHM,
County Auditor.

$99.12
.25
99.37

EXHIBIT "59."

Redemption Qui-tus.

County Auditor's Office.

Indianapolis, Ind., Oct. 21st, 1910.

This is to certify that Wm. V. Rooker has filed in the Auditor's office of said county, the Treasurer's receipt for fifty eight and 89/100 dollars for the redemption of the following described real estate in Marion County, Indiana, towit:

S. E. ¼ N. E. ¼ Sec. 33 Tp. 17R. 4-40 acres.

Bought by J. B. Bilderback on the 14th day of February, 1910 and sold in the name of Wm. V. Rooker on certificate No. 48,416 for taxes for 1908 and 1909 and I hereby certify that the said redemption has been entered in Sale Book Vol. 17 Page 4.

Witness my hand and official seal, this 21st day of Oct. 1910.

ALBERT SAHM,
County Auditor.

$58.89
.25
59.14

EXHIBIT "60."

Duplicate No. 7.

Auditor's Assessment.

Book —. Wash. Tp.

Treasurer's Office, Ind'p'l's, Ind., 1911.

Received of Fidelity Trust Company, Tp. For State, County Township and City of Ind'p'l's. Taxes for year 1910 First.

	Net valuation.	Amt. to pay.
S. E. ¼ N. E. ¼ 33-17-4, 40 acres....	$2,000.00	$11.60

199 —— Co., Tr. Dora E. Rooker, to E. G. Sourbein.

224-17.
S. W. N. W. ¼ 34-17-4-40 acres.
Net Val. 3,500, $43.75.

Approved for payment this 12th day of October, 1916.

FIDELITY TRUST COMPANY,
By T. P. SEXTON,
Asst. Secy. Treas.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Received of The Fidelity Trust Company — the sum of — in full settlement of the above account.
Paid Oct. 14, 1910. A. F. EICKHOLL,
Cashier.

EXHIBIT "68."

Duplicate No. 4644.

Washington Township Treasurer's Office.

Indianapolis, Ind., 1916.

Received of Fidelity Trust Co., Tr., for the first installment of State, County and Township Taxes in the following described property:

	Description.		Value.	
48-36.	S. E. ¼ N. E. ¼ 33-17-4-40 acres.....	2,400		$18.48

ED. G. SOURBEIN,
County Treasurer.

The Fidelity Trust Company of Indianapolis, Ind.

Fidelity Trust Co., Tr. Dora E. Rooker, t- E. D. Sourbein, Treas.

48-36 S. E. ¼ N. E. ¼ 33-17-4-40 acres, Net value 2,400 $18.48.

Approved for payment this 13th day of October, 1916.
FIDELITY TRUST CO.,
By T. P. SEXTON.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity — of
200 Taxes, Delinquent for the year 1914 on account of State, County and Township on the following described property:

Description: 48-36 S. E. ¼ N. E. ¼ 33-17-4-40 acres.

Tax	$31.64
Adv	.40
	32.04
Cost	.50
Total	32.54

ED. G. SOURBIER,
County Treasurer.

The Fidelity Trust Company of Indianapolis, E. G. Sourbier, Treas.

Taxes Pt. S. W. ¼ N. W. ¼ 34-17-4	$67.36
S. E. ¼ N. E. ¼ 33-17-4	32.54
	99.90

Approved for payment this 14th day of February 1916.
FIDELITY TRUST COMPANY,
By TIMOTHY P. SEXTON.

This voucher, when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Company of Indianapolis.

Received of the Fidelity Trust Company — the sum of — in full settlement of the above account.
Paid Feb. 14, 1916.

A. F. EICKHOFF,
Cashier.

EXHIBIT "67."

Duplicate No. 11272

Lawrence Township.

Treasurer's Office.

Indianapolis, Ind., 1916.

Received of Fidelity Trust Co., Tr., for the first installment of State, County and Township Taxes on the following described property.

Description.	Valuation.	
224-17.		
S. W. ¼ N. E. ¼ 34-17-4 — acres	3,500	$43.75

ED. G. SOURBIER,
County Treasurer.

201 The Fidelity Trust Company of Indianapolis: Fidelity Trust *Trust* Company of Indianapolis, —.

Received of the Fidelity Trust Co., — the sum of — Dollars in full settlement of the above account.
Paid Oct. 14, 1916.

A. F. EICKHOFF,
Cashier.

EXHIBIT "69."

Duplicate No. 11272.

Lawrence Township.

Treasurer's Office.

Indianapolis, Ind., 1916.

Received of Fidelity Trust Company, Trustee, Principal, Penalty, Interest and costs of Taxes Delinquent for the year 1915 on account of State, County and Township on the following described property:
Description: 224-17. N. W. ¼ 34-17-4 40 acres, 3,500.

Tax	$43.75
Costs	.50
	44.25

ED. G. SOURBIER,
County Treasurer.

The Fidelity Trust Company of Indianapolis to Ed G. Sourbier.

Dora E. Rooker Mtge. Loan.

2¼ taxes S. W. ¼ N. W. ¼	43.75
Costs	.50
	44.25

Approved for payment this 25th day of Oct. 1916.

FIDELITY TRUST COMPANY,
By T. P. SEXTON,
Asst. Secy. Treas.

Received of The Fidelity Trust Company — the sum of — in full settlement of the above account.
Paid Nov. 13, 1916.

A. F. EICKHOFF,
Cashier.

EXHIBIT 70.

Duplicate No. 4644.

Washington Township.

Treasurer's Office.

Indianapolis, Ind., 1916.

Received of Fidelity Trust Co., Trustee, Principal Penalty,
202 Interest and costs of Taxes Delinquent for the year 1915 on account State, County and Township on the following described property:

Description: 48-36. S. E. ¼ N. E. ¼ 33-17-4.
Value: 2,400.

Tax	17.95
Cost	.50
	18.45

J. B. SOURBIER,
County Treasurer.

The Fidelity Trust Company of Indianapolis to E. G. Sourbier, Treas.

Dora E. Rooker

¼ S. E. ¼ N. E. ¼ 33-17-4	$17.95
	.50
	18.45

Approved for payment this 25th day of October 1916.
FIDELITY TRUST CO.,
By T. P. SEXTON.

This voucher, when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Company of Indianapolis.

Received of The Fidelity Trust Company, —, the sum of — Dollars in full settlement of the above account.

Paid Nov. 13, 1916.

A. F. EICKHOFF,
Cashier.

EXHIBIT "71."

Receipt No. 612.

Duplicate No. 1.

Noblesville Township.

$73.53. Noblesville, Hamilton County, Ind., 5/18/1910.

Received of Dora E. Rooker the sum of Seventy Three 53 — Dollars in full for the first installment of State, County, township and corporation Taxes for the year 1919 on $10,215 of personal
203 Property, Poll, and the following described real estate:

Pt. S. E. Sec.	12,	Tp. 18,	R. 4	59 acres 60 h'ds.
Pt. W. S. W.	7	18	5, 48	
W. N. W.	18	18	5, 91	50
Pt. N. E.	13,	18,	5, 65	

Mtg. Exemp., 700.
Net val., 9,480.

JOHN T. BAUCHERT,
Treasurer Hamilton Hamilton *County.*

EXHIBIT "71."

No. 1220.

Fidelity Trust Company: Fidelity Trust Company.

Indianapolis, Ind., May 17, 1910.

Pay to the order of John Bauchert, Treas., $73.53, Seventy Three and 53/100 Dollars.

W. M. FOGARTY,
President.
THOMAS B. FULMER,
Sec.-Treas.

To The Capitol National Bank, Indianapolis, Indiana.

Endorsement on back: John Bauchert, Treasurer, Pay to the order of any Bank, Banker or Trust Co., First National Bank, Noblesville, Ind. Fred M. White, Cashier. Paid May 20, 1910. Capitol National Bank.

EXHIBIT "72."

No. 2244.

Fidelity Trust Company.

Fidelity Trust Company Pay to the order of John Bauchert, Treas., $64.33, Sixty Four and 33/100 Dollars.

W. M. FOGARTY,
President.
THOMAS B. FULMER,
Sec.-Treas.

To the Capitol National Bank Indianapolis, Ind

Endorsed on back: John Bauchert Treasurer. Paid Oct. 18, 1910. Fletcher American National Bank of Indianapolis.

Receipt No. 612.

Noblesville, Hamilton County, Ind., 10-15-1910.

204 Received of Dora E. Rooker the sum of Sixty Four .33 Dollars in full for the second instalment of State County, Township and corporation taxes for the year 1909 on $10,215 of *of* Personal Property Poll, and the following described real estate:

Description.	Sec.	Twp.	Range.	Acres.	Hunds.	Net val.
Pt. S. E.	12	18	4	59	60	
Pt. W. S. W.	7	18	5	48	..	
W. N. W.	18	18	5	91	50	
Pt. N. E.	13	18	5	65	..	9,480

Mortgage Exemption 700.

JOHN BAUCHERT,
Treasurer Hamilton County.

EXHIBIT "73."

Fidelity Trust Company.

No. 535. Indianapolis, Ind., Apr. —, 1911.

Fidelity Trust Company pay to the order of John Bauchert, treasurer, $159.34, One Hundred Fifty Nine and 34/100 Dollars.

THOMAS B. FULMER,
Secy. Treas.

Treasurer'- Check.

Endorsement on back: Pay to order of Citizens State Bank, Noblesville, Ind. John Bauchert Treas. Paid May 8, 1911, Indiana Natl. Bank.

Receipt No. 263.

Noblesville Township.

$159.34. Noblesville, Hamilton County, Ind., 5-1-1911.

Received of Fidelity Trust Co. — D. E. Rooker, the sum of One Hundred Fifty-nine 34-100 Dollars, in full for the first installment of State, County, Township and corporation Taxes for the year 1910 on $17,320.

205

Description.	Sec.	Twp.	R.	Acres.	Hunds.	Net valuation.
Pt. S. E.	12	18	4	59	60	
Pt. W. S. W.	7	18	5	48	..	
Pt. W. N. W.	18	18	5	91	50	
Pt. N. E.	13	18	4	65	..	15,480.

JOHN BAUCHERT,
Treasurer Hamilton Co.

EXHIBIT "74."

The Fidelity Trust Company of Indianapolis.

Fidelity Trust Co., Trustee Dora E. Rooker, to J. E. Best, Treas. Hamilton County.

Fall Taxes as per attached:

Pt. S. E., S. 12 T. 18, R. 4, 59.60 acres.
P. W. of S. W., S. 7, T. 18, R. 5, 48 acres.
W. of N. W., S. 18, T. 18, R. % 91.50 Acres.
P. N. E., S. 13, T. 18, R. 4, 65 acres.
$444.34.

Approved for payment this 8th day of November 1912.
FIDELITY TRUST CO.,
By TIMOTHY P. SEXTON,
Ass't Sec.

Indianapolis, Ind., Nov. 9, 1912.

Received of the Fidelity Trust Company *Co.*, the sum of Four Hundred Forty four & 34-100 Dollars in full settlement of the above account.

JOHN E. BEST,
Treas. Hamilton Co.

The Fidelity Trust Company of Indianapolis, Trustee for Dora E. Rooker, to Treasurer of Hamilton County.

1913, first installment, May 3, to pay taxes on real estate owned in Hamilton County by the Fidelity Trust Co. as Trustee for Dora E. Rooker in the sum of $136.29.

Receipt #259. Noblesville Township, Noblesville, Ind., May 5, 1913.

Property described as follows:

206 P. S. E. 12-18-4, 59.60 Acres.
P. W. of S. W. 7-18-5, 48 acres.
W. of N. W. 18-18-5, 91.50 acres.
P. N. E. 13-18-4, 65 acres
Net valuation $15,090.00

Approved for payment this 3rd day of May 1913.

FIDELITY TRUST CO.,
Trustee,
By W. M. FOGARTY,
Pres.

This voucher when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Co., Company of Indianapolis.

Indianapolis, Ind., May 3rd, 1913.

Received of The Fidelity Trust Company, Trustee for Dora E. Rooker, the sum of One Hundred Thirty six & 29/100 Dollars in full settlement of the above account.

$136.29.

JOHN E. BEST,
County Treas.

EXHIBIT "76."

Quietus.

Office of County Auditor.

No. 1183. Noblesville, Ind., 6-30-1916. $855.10.

I hereby certify that, Fidelity Trust Co., of Rooker sale has filed in my office the receipt of the Treasurer of Hamilton County Indiana for Eight Hundred Fifty Five 10/100 Dollars on account of Tax sale, Rooker land.

As per itemized statement on back hereof.

W. O. HORTON,
Auditor Hamilton County, Ind.

Fidelity Trust Company, Indianapolis.

Indianapolis, Ind., June 29, 1916.

Pay to the order of L. G. Henry, Treas. Hamilton Co., $855.10, Eight Hundred Fifty Five & 10/100 Dollars.

TIMOTHY P. SEXTON,
Asst. Secy. Treas.

Treasurer Check.

Endorsement on back: Pay to the order of L. G. Henry, Treas. Paid Jul. 5, 1916.

207 Delinquent Taxes for 1915.

Treasurer's Office.

Noblesville Township.

No. 267.

Noblesville, Hamilton County, Ind., 10-14-1916. $319.15.

Received of Fidelity Trust Co., Trustee D. E. Rooker, the sum of Three hundred Nineteen Dollars and 15/100 Cents. In full for State, County, School, Special School Township, Gravel Roads Construction and Road Tax, delinquent for the year 1915 on personal property, poll and on the following described real estate:

Description of Land.

	Sec.	Town.	Range.	Acres.	Hund.
Pt. S. E.	12	18	4	59	60
P. W. S. W.	7	18	5	48	
W. N. W.	18	18	5	91	50
P. N. E.	13	18	4	65	65

T. G. HENRY,
Treasurer of Hamilton County.

The Fidelity Trust Company of Indianapolis, Fidelity Trust Co. Tr. D. E. Rooker, to L. G. Henry, Treas. Hamilton Co.

#267. 319.15.

Approved for payment this 13th day of October 1916.

FIDELITY TRUST CO.,
By T. P. SEXTON,
Asst. Secy. Treas.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Noblesville, Oct. 14, 1916.

Received of The Fidelity Trust Co., the sum of Three Hundred (fifteen cents) Dollars in full settlement of the above account $319.15.

L. G. HENRY,
Co. Treas. Hamilton Co.

EXHIBIT "78."

Fidelity Trust Company.

Indianapolis, Ind., June 25, 1913.

Fidelity Trust Company pay to the order of Will F. Wall,
208 Clerk, $442.42, Four Hundred Forty-two 42/100 Dollars.
a/c Dora E. Rooker. In Payt. Judg., int., & costs in case of Ludowici Caladeon Co.
(Signed) HENRY SEYFRIED,
Gen'l Counsel.

Endorsed on back: Will F. Wall Clerk.

EXHIBIT "79."

Fidelity Trust Company.

Indianapolis, Ind., June 25, 1913.

Fidelity Trust Company pay to the order of J. Fred France, Clerk, $28.70, Twenty-eight 70/100 Dollars.

HENRY SEYFRIED,
Gen'l Counsel.

A/C Dora E. Rooker costs in Appellate Court on Ludowici Caledeon Co.
William V. Rooker and Dora E. Rooker vs. Ludowici Caledeon Co. Exhibit No. 4. Appeal from Hamilton Circuit Court. $28.70 Clerk's Office, Appellate Court of Indiana.

Indianapolis, June 25th, 1913.

Received of Fidelity Trust Company Twenty-eight and 70/100 Dollars in full payment of all costs in the above named cause in said Appellate Court.

No 7783

J. FRED FRANCE,
Clerk Appellate Court.

Fee Book 8, page 107.

EXHIBIT "80."

The Fidelity Trust Company of Indianapolis, Acct. Dora E. Rooker, to Fidelity Trust Co., Agt.

Acct. Dora E. Rooker.

1914, Oct. 17.	To premium on insurance underwriters' policy #557,096, $1,900.00	$22.80
	To prem. on Globe and Rutgers policy #839,191, $3,050.00	36.60
	To prem. on Pacific Fire Policy #380,732 $3,050.00	36.60
		$96.00

209 Approved for payment this 17th day of October, 1914.
FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

This voucher, when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Oct. 17, 1914.

Received of The Fidelity Trust Co. Acct. Dora E. Rooker the sum of Ninety-six and 00/100 Dollars $96.00.

FIDELITY TRUST CO.,
JAMES McNULTY,
V. Pres. and Mag. Ins. Dept.

EXHIBIT "81."

The Fidelity Trust Company of Indianapolis, Acct. Dora E. Rooker, to Fidelity Trust Co., Agt.

Acct. Dora E. Rooker.

1916, Apr. 28, to pay premiums of D. $45.50 for policy #839,169 Globe and Rigers, beginning Aug. 8, 1914, expiring Aug. 8, 1917, as follows $700.00 on frame building $2,000.00 on barns, etc. Sec. 34 ,Twp. 13, Lawrence, Range 4.

Approved for payment this 28th day of April 1916.
FIDELITY TRUST COMPANY.
By W. M. FOGARTY, *Prest.*

This voucher when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Apr. 28, 1916.

Received of The Fidelity Trust Com., the sum of Forty and Fifty/100 Dollars in full settlement of the above account.
$40.50.

FIDELITY TRUST CO.,
By JAMES McNULTY,
V. Pres. and Mgr. Ins.

EXHIBIT "82."

No. 8567.

Fidelity Trust Company.

Indianapolis, Ind., —— 21, 1913.

Fidelity Trust Company, Indianapolis, pay to the order of American Central Life Insurance Co., $14,424.50 Fourteen Thousand Twenty-four and 50/100 Dollars.
210

W. M. FOGARTY,
President.
JAS. G. FLASHERTY,
Secy. & Treas.

To The Indiana National Bank, Indianapolis, Ind.

Endorsement on back: Pay to the order of Indiana National Bank, American Central Life Insurance Co. By Geo. E. Hume, Treas. Paid No. 22, 1913.

EXHIBIT "83."

The Fidelity Trust Co. of Indianapolis, Trustee Dora E. Rooker & W. V. Rooker, to Kane & Kane, Attorneys, Noblesville, Ind.

1912, No. 25, for legal services in re Dora E. Rooker and W. V. Rooker trusteeship, $50.00.

Approved for payment this 24th day of November, 1912.
FIDELITY TRUST COMPANY,
By WM. M. FOGARTY, *Pres.*

This voucher when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Co., of Indianapolis.

Indianapolis, Ind., Nov. 26, 1912.

Received of The Fidelity Trust Company, Trustee Dora E. Rooker & W. V. Rooker, the sum of Fifty and No/100 Dollars in full settlement of the above account.
$50.00.

KANE & KANE,
Attorneys.

EXHIBIT "84."

The Fidelity Trust Company of Indianapolis, Dora E. Rooker Trust, to Henry Seyfried, Attorney.

1913, Mar. 19, to legal services to date in connection with legislation and legal questions arising on matters with regard to Dora E. Rooker property, $100.00.

Approved for payment this 19th day of March 1913.

This voucher when dated and properly signed by the person in — favor it is made, becomes a draft on the Fidelity Trust Co., of Indianapolis.

Indianapolis, Ind., March 19, 1913.

211 Received of The Fidelity Trust Company the sum of one Hundred & No/100 Dollars in full settlement of the above account.
$100.00.

HENRY SEYFRIED,
Attorney.

EXHIBIT "85."

The Fidelity Trust Company of Indianapolis, Ind., Trustee Dora E. Rooker Estate, to Henry Seyfried, Attorney.

1912, June, 14, for expenses to and from Noblesville in re Balke Krause suit, $2.50.

Approved for payment this 14th day of June 1912.

FIDELITY TRUST CO.,
Trustee Dora E. Rooker.
By W. M. FOGARTY,
Pres.

This voucher, when date- and properly signed by the person in — favor it is made, becomes a draft on the Fidelity Trust Company, of Indianapolis.

Indianapolis, Ind., June 14, 1912.

Received of The Fidelity Trust Company the sum of Two and 50/100 in full settlement of the above account.
$2.50.

HENRY SEYFRIED.

EXHIBIT "86."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

1910, April 9, Continuation of Rooker abstract, Hamilton County Farm, $1.50.

Approved for payment this 4th day of October 1910.
FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

This voucher when date- and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Co. of Indianapolis.

Indianapolis, Ind., Oct. 4, 1910.

Received of the Fidelity Trust Co., Trustee Dora E. Rooker, the sum of one & 50/100 dollars in full settlement of the above account.
$1.50. FIDELITY TRUST CO.,
By W. M. FOGARTY.

EXHIBIT "87."

112 The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

1910, Mar. 1, continuation of abstract Rooker Hamilton County Farm, $2.50.

Work done by Hamilton Trust Co. Receipted bill attached to original voucher.

Approved for payment this 28th day of December 1910.
FIDELITY TRUST CO.,
Trustee.
By W. M. FOGARTY,
Pres.

This voucher when dated and properly signed by the person in favor it is made becomes a draft on the Fidelity Trust Co. of Indianapolis.

Indianapolis, Ind., Dec. 28, 1910.

Received of the Fidelity Trust Co., Trustee Dora E. Rooker the sum of Two and 50/100 Dollars in full settlement of the above account.
$2.50. FIDELITY TRUST COMPANY,
By W. M. FOGARTY,
Pres.

EXHIBIT "88."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

1911, Nov. 24, Continuation of Rooker abstract, Hamilton Co. farm, $2.50.
Bill attached to original voucher.

Approved for payment this 20th day of December, 1919.
FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

This voucher when signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Company of Indianapolis

Indianapolis, Ind., Dec. 20, 1911.

Received of The Fidelity Trust Company, Trust- Dora E. Rooker, the sum of two and 50/100 dollars in full settlement of the above account.
$420.00.
FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

EXHIBIT "89."

213 The Fidelity Trust Company, of Indianapolis, Trustee Dora E. — & The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker & W. V. Rooker, to the Hamilton Trust Co

1912, June 18, to continuation of abstract of title to land of Dora E. Rooker, $2.00.

Approved for payment this 22nd day of June, 1912.
FIDELITY TRUST COMPANY.
By W. M. FOGARTY,
Pres.

This voucher when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Co., of Indianapolis.

Indianapolis, Ind., June 22, 1912.

Received of The Fidelity Trust Company, Trustee Dora E. & W. V. Rooker, the sum of two & no/100 dollars in full settlement of the above account.
$2.00.
HAMILTON TRUST CO.,
R. I. STUDEVANT,
Sec. & Treas.

EXHIBIT "90."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Hamilton Trust Company.

To continuation of abstract land in Hamilton County, $6.00.

Approved for payment this 14th day of April, 1913.
FIDELITY TRUST COMPANY,
Trustee,
By J. ALBERT SMITH,
Trust Officer.

Indianapolis, Ind., April 15, 1913.

Received of The Fidelity Trust Company the sum of six Dollars in full settlement of the above account.
$6.00.

HAMILTON TRUST CO.,
E. L. STURDEVANT,
Sec. & Treas.

STATE OF INDIANA,
Hamilton County, ss:

In the Matter of the Estate of ROOKER

April 15, 1915. $6.00.

Received of Fidelity Trust Company, Trustee of said Estate, Six Dollars for continuation of abstract on Rooker land.
F. S. CAMPBELL,
Secy.

(Duplicate.)

214 EXHIBIT "91."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Company.

1911, Dec. 8, to continuation of Rooker Abstract, $3.50.
Receipted statement from W. M. Coval & Son, Indpls., attached to voucher.

Approved for payment this 8th day of December, 1911.
FIDELITY TRUST COMPANY,
By W. M. FOGARTY,
Pres.

This voucher when dated, and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Dec. 8, 1911.

Received of the Fidelity Tust Co., Trustee Dora E. Rooker, the sum of Three and 50/100 Dollars in full settlement of the above account.
$3.50.

FIDELITY TRUST CO.
By W. M. FOGARTY,
Pres.

EXHIBIT "92."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, t- W. M. Coval & Son.

Continuation of abstract, $2.50.
Receipted statement attached to original.

Approved for payment this 19th day of Mar, 1913.
FIDELITY TRUST CO.,
By J. ALBERT SMITH.

This voucher when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Co. of Indianapolis.

Indianapolis, Ind., —— —, 1911.

Received of the Fidelity Trust Co., —, the sum of — in full settlement of the above account.

—— ——.

EXHIBIT "93."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

215 1910, June 10, ten telephone calls at 15¢ Fidelity Trust Co. to Rooker at Noblesville, $1.50.

1909, Oct. 15.	Fulmer to Rooker	25	No. 2.
Oct. 15.	Fogarty to Rooker	15	No. 1.
Oct. 15.	Fulmer to Rooker	20	No. 2.
1910, Jan. 3.	Fogarty to Rooker	15	No. 3.
Mar. 22.	Fogarty to Clark	15	No. 4.
Mar. 23.	Fogarty to Trust Co.	15	No. 4.
26.	" "	15	"
Apr. 8.	Fulmer to Rooker	15	No. 5.
May 11.	Fogarty to Rooker	15	No. 6.
		1.50	

Approved for payment this 10th day of June, 1910.
FIDELITY TRUST COMPANY,
Trustee.
By WM. FOGARTY,
Pres.

This voucher when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Company, of Indianapolis.

Indianapolis, Ind., June 10th, 190-.

Received of The Fidelity Trust Co., Trustee of Dora E. Rooker, the sum of one and 50/100 Dollars in full settlement of the above account.
$1.50.

FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

EXHIBIT "94."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

Long Distance Telephone.

1910.

May 2.	Henry Seyfried, Att'y to Sheets, Noblesville, in re Rooker	$ .15
May 9.	W. M. Fogarty to Shirts, Noblesville, in re Rooker	.25
25	Total	$ .40

Approved for payment this 14th day of July 1910.
FIDELITY TRUST COMPANY,
Trustee,
By W. M. FOGARTY,
Pres.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., July 11, 1910.

Received of The Fidelity Trust Company, Trustee Dora E. Rooker the sum of Forty Cents only in full settlement of the above account.
$.40.

FIDELITY TRUST COMPANY,
By W. M. FOGARTY,
Pres.

EXHIBIT "95."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

1910, Oct. 6. Long Distance to Rooker, by Fogarty, as per attached bill, $.15.

Approved for payment this 19th day of November, 1910.

FIDELITY TRUST CO.
By W. M. FOGARTY,
Pres.

Indianapolis, Ind., Nov. 19, 1910

Received of The Fidelity Trust Company, Trustee Dora E. Rooker the sum of fifteen cents only in full settlement of the above account, $.15.

FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

EXHIBIT "96."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Company

1911, June 23, long distance as per attached bill, .15.

Approved for payment this 23rd day of June 1911.

FIDELITY TRUST COMPANY,
Trustee.

By W. M. FOGARTY,
Pres.

This voucher when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust
217 Company of Indianapolis.

Indianapolis, Ind., June 23, 1911.

Received of The Fidelity Trust Co., Trustee Dora E. Rooker, the sum of fifteen cents only in full settlement of the above account. $.15.

FIDELITY TRUST COMPANY,
By W. M. FOGARTY,
Pres.

EXHIBIT "97."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Company.

1911, May 17. Automobile hire to Marion County farm and return, $5.00.

Approved for payment this 17th day of May, 1911.

FIDELITY TRUST COMPANY.
By W. M. FOGARTY,
Pres.

This voucher when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., May 17, 1910.

Received of The Fidelity Trust Company, Trustee Dora E. Rooker, the sum of Five & No/100 Dollars in full settlement of the above account.
$5.00.

FIDELITY TRUST CO.
By W M FOGARTY,
Pres.

EXHIBIT "98."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

1911, May 29. Automobile hire to Marion County farm and return, $5.00.

Approved for payment this 29th day of May, 1911.
FIDELITY TRUST COMPANY.
W. M. FOGARTY,
Pres.

This voucher when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Co. of Indianapolis.

Indianapolis, Ind., May 29, 1911.

Received of The Fidelity Trust Company, Trustee Dora E.
218 Rooker the sum of Five and No/100 Dollars in full settlement of the above account.
$5.00.

FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

EXHIBIT "99."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

1911, May 5, Advertisement of Marion County farm in "Indiana Catholic," 14 inches space at 35¢ per —, $4.90.

(Receipted statement attached to original voucher).

Approved for payment this 17th day of June, 1911.

This voucher when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Company of Indianapolis.

FIDELITY TRUST CO.,
By W. M. FOGARTY,
Pres.

Indianapolis, Ind., June 17, 1911.

Received of the Fidelity Trust Company, Trustee Dora E. Rooker, the sum of Four & 90 100 Dollars in full settlement of the above account.

$4.90. FIDELITY TRUST COMPANY,
By W. M. FOGARTY,
Pres.

EXHIBIT "100."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co.

1911, July 25. 26 words in News one time 26
July 7. 7 lines at 4¢ in Star 28

.54

(Receipted statements attached to original.)

Approved for payment this 14th day of Aug. 1911.
FIDELITY TRUST CO.,
Trustee.
By W. M. FOGARTY,
Pres.

This voucher when dated and properly signed by the person in whose favor it is made becomes a draft on the Fidelity Trust Co of Indianapolis.

219 Indianapolis, Ind., Aug. 14, 1911.

Received of The Fidelity Trust Company Trustee Dora E. Rooker the sum of Fifty-four Cents in full settlement of the above account. $.54.

FIDELITY TRUST CO.
By W. M. FOGARTY,
Pres.

And the plaintiffs are ruled to answer same, not later than Saturday June 30th, 1917, at nine o'clock A. M. and afterwards towit: On the 6th day of July, 1917, the same being the 83rd Judicial Day of the April Term, 1917, of said court, the following further proceedings were had in said cause towit:

"Comes now the parties and the plaintiffs file an affidavit for a change of venue from the judge which affidavit reads as follows: H. I.) Said motion is now sustained and the said change is now granted and by agreement of the parties Judge Earl Sample of the Hancock Circuit Court is now appointed Special Judge to try this cause."

And afterwards towit: on the 11th day of July, 1917, being the 87 judicial day of the April term, 1917, the following proceedings were had in said cause towit:

"Comes the parties and the Honorable Earl Sample, heretofore appointed Special Judge in this cause now appears and accepts said appointment and qualifies as provided by law, and makes herein his oath of office in writing in the words and figures following towit: H. I.)

220 "And the plaintiffs now filed herein their several motions to strike out the second amended counter claim of the Fidelity Trust Company which said motion to strike out is in the words and figures following to-wit:

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.
v.
FIDELITY TRUST COMPANY.

Motion to Strike Out.

The plaintiffs severally move the court to strike from the files in this cause the second amended counter claim of the Fidelity Trust

Company filed herein on to-wit the 27th day of June 1917 and for cause say: That said second amended counter claim is vague, indefinite and uncertain and tenders no issue; that in the nature of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of a quantum meruit with valuations as fixed by the said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement or (3) upon the single and
221 definite theory of a quantum valebat founded upon acts done by the said defendant to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by the said defendant to the damage of said trust estate, and which said excess in value of benefits over damage of the said trust estate has accepted and appropriated to its own use, benefit and advantage.

And these plaintiffs say that said second amended counter claim avers facts inconsistent with and contradictory of the statement therein "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed" and that because of such inconsistencies and contradictions, the said averment is nullified and destroyed, to-wit, the averment "That said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed" and that in the premises there is no issue tendered by the said second amended counter claim that said defendant is entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering any liability whatsoever against these plaintiffs in favor of said defendant upon said counter-claim.

And these plaintiffs further say that said second amended counter claim avers no fact in excuse of the failure on defendant- part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendant is entitled herein to employ said trust agreement to fix the value, as
222 upon a quantum meruit, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement, and these plaintiffs say that in the premises there is no issue tendered by said second amended counter claim that the said defendant is entitled to any recovery whatsoever, as upon an issue the quantum meruit, against these plaintiffs in favor of said defendant upon said counter claim.

And these plaintiffs further say that said second amended counter claim avers no facts founded upon acts done by said defendant to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by

the said trust estate because of any failure, omission or wrong done by the said defendant to the damage of said trust estate and which said excess in value of benefits over damages the said estate has accepted and appropriated to its own use, benefit and advantage.

That upon the facts in the premises the said second amended counter claim tenders no issue whatsoever in favor of said defendant and is useless and can accomplish no proper and lawful purpose in this cause and is a needless encumbrance of the records and should be striken from the files herein.

And this these plaintiffs do ever pray.

W. V. ROOKER,
F. G. CHRISTIAN,
Attorneys for Plaintiffs.

And the court being sufficiently advised now overrules the said motion to strike out to which ruling of the Court the plaintiffs at the time separately except.

And the plaintiffs now file herein their several demurrers in two paragraphs to the second amended counter claim of Fidelity Trust Company which said demurrers are in the words and figures following to-wit:

223 STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

v.

FIDELITY TRUST COMPANY.

Several Demurrers in Two Paragraphs.

1. The plaintiffs severally demur to the second amended counter claim of the Fidelity Trust Company, filed herein on to wit the 27th day of June, 1917, and for cause as by their first paragraph of demurrer say: That the facts stated in said counter claim are not sufficient to constitute a cause of defense.

2. The plaintiffs further severally demur to the second amended counter claim of the Fidelity Trust Company, filed herein to-wit on the 27th day of June, 1917, and for cause, as by their second paragraph of demurrer, say: That the facts stated in said counter claim are not sufficient to constitute a cause of action.

And for their memorandum filed with each of said several paragraphs of demurrer, stating wherein such pleading is insufficient for want of facts, these plaintiffs respectively say: That in the na-

ture of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of a quantum meruit with valuation as fixed by the said trust
224 agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement or (3) upon the single and definite theory of quantum valebat founded upon facts done by the said defendant to the credit use and benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by said defendant to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate has accepted and appropriated to its own use, benefit and advantage.

And these plaintiffs say that said second amended counter claim avers facts inconsistent with and contradictory of the statement therein "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed" and that because of such inconsistencies and contradictions, the said averment is nullified and destroyed, to wit; the averment, "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed," and that in the premises there is no issue tendered by the said second amended counter claim that the said defendant is entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendant of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendant upon said counter claim.

And these plaintiffs further say that said second amended counter claim avers no facts in excuse of the failure on the defendant's part to make full and complete performance of said so called
225 trust agreement and by reason of which excuse for the full and complete performance of said so called trust agreement said defendant is entitled herein to employ said trust agreement to fix the value, as upon quantum meruit, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement, and these plaintiffs say that in the premises there is no issue tendered by said second amended counter claim that the said defendant is entitled to any recovery whatsoever, as upon an issue the quantum meruit, against these plaintiffs in favor of said defendant upon said counter claim.

And these plaintiffs further say that said second amended counter claim avers no fact founded upon acts done by said defendant to the credit, use, benefit and advantage of the said trust estate in the aggregating exceeding in value the damage suffered and sustained by the said trust estate because of any failure, omission or wrong

done by the said defendant to the damage of said trust estate and which said excess in value of benefits over damages the said estate has accepted and appropriated to its own use, benefit and advantage.

W. V. ROOKER,
F. G. CHRISTIAN,
Attorneys for Plaintiffs.

And the court now takes said demurrer under consideration.

And afterwards to wit; On the 1st day of August, 1917, the same being the 105th Judicial Day of the April Term, 1917 of said court, the following further proceedings were had:

226 "Come now the parties and the plaintiffs' demurrers to the 2nd amended counter claim of the defendant Fidelity Trust Company *is* now overruled by the court to which ruling of the court the plaintiffs at the time separately and severally except and said plaintiffs are now ruled to answer which 2nd amended counter claim, on or before Saturday August 4th, 1917, at 9.00 o'clock A. M."

And afterwards to wit; On the 4th day of August, 1917, the same being the 108 Judicial Day of the April Term, 1917, of said court, the following further proceedings were had, to wit:

"Come now the parties and the plaintiffs file their separate and several motions to make the second amended counter claim more specific, which separate and several motions read as follows:"

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

DORA E. ROOKER et al.

v.

FIDELITY TRUST COMPANY.

The plaintiffs, Dora E. Rooker and William V. Rooker, severally, move the court for an order herein to require the defendant, Fidelity Trust Company, to make more certain and specific as to each of the several particulars hereinafter respectively numerated, its second amended counter claim, filed herein on, to wit, the 27th day of June, 1917, said several particulars being as follows, to wit:

First. If it be true, as says counter claim says it is true, that said defendant "has fully and duly performed all of the conditions
227 on its party to be by it performed" then state the facts which cause, or excuse, as the case may be, the delay on your part in closing up the affairs of said trust, during the time of which delay interest charges have accumulated against said trust estate, you say, in the aggregate sum, to wit ten thousand dollars.

Second. State the facts which cause, or excuse, as the case may be, your failure to apply the proceeds of any sale or sales of said real estate made pursuant to the said trust agreement, as follows:

(1) To the payment of any mortgage or other valid lien, charge, adverse interest or incumbrance upon and against said real estate or any part of the real estate herein described, which may be prior and superior and adverse to the interest of the Fidelity Trust Company.

(2) To the payment of the moneys advanced by second party to first parties or paid to the use and benefit of first parties as in said trust agreement authorized and provided.

(3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as in said trust agreement authorized and provided.

(4) To pay to the said Dora E. Rooker, her heirs, executors, administrators and assigns the rest and residue remaining of any money arising from the sale of said real estate.

Third. State the facts which cause or excuse, as the case may be, the maturity of the debt which you charge against the plaintiffs.

Fourth. State the date on which matured, if at all, the
228 debt which you charge against the plaintiffs.

Fifth. State the facts which constitute the duty and necessity, if any, on your part to have employed attorneys, viz: Mr. Henry Seyfried and Messers. Kane and Kane on the occasion when and for the services in which they were so employed.

Sixth. If it be not in fact true, as stated by you to be true, that you have fully and duly performed all of the conditions of said trust agreement on your part to be performed, then state the facts if any in the conduct, action and behavior of these plaintiffs, or either of them, which constitute the cause, or excuse, as the case may be, the failure on your part to carry out and perform the conditions of said trust agreement on your part to be performed.

Seventh. If it be not in fact true, as stated by you to be true, that you have fully and duly performed all the conditions of said trust agreement on your part to be performed, and if such failure on your part be not due to the conduct, action or behavior of these plaintiffs or either of them, then state the facts which constitute your failure to carry out and perform the conditions of said trust agreement on your part to be performed.

Eighth. As to the alleged interest designated in said counter claim as the American Central Life Insurance Company mortgage, state the fact or facts which constitute your right to have acquired said mortgage by purchase and assignment and your right now to assert said mortgage, interest as one hostile and adverse to your said interests and duty as trustee under and by virtue of said trust agreement, or,

in the alternative, if said mortgage was by you acquired as an
229 act of repudiation, or in furtherance of an act of repudiation on your part, of said trust agreement, then state such, all such facts as an alternative showing, all to the end that these plaintiffs may be advised whether said mortgage is pleaded as a fact within the terms of said trust or as a fact hostile and adverse to said trust.

W. V. ROOKER,
F. G. CHRISTIAN,
Attorneys for Plaintiffs.

Said motion is now overruled by the court to which ruling the plaintiff at the time separate and severally except.

And afterwards to-wit: On the 23rd day of October, 1917, the same being the 20th Judicial day of the October Term of said court the following further proceedings were had to-wit:

"Come now the parties and the plaintiffs file a supplemental complaint which reads as follows:"

STATE OF INDIANA,
County of Marion, ss:

In the Hamilton Circuit Court, October Term, 1917.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY et al.

Supplemental Complaint.

Par. 1. Dora E. Rooker and William V. Rooker, plaintiffs further complaining of grievances which have occur-ed to them since the filing of their original complaint herein, and for their first paragraph of supplemental complaint, say: That plaintiffs now here re-affirm each and every allegation in their original complaint contained and in their amended complaint herein as of the several respective
230 dates of said several respective pleadings; that since the bringing of this action and since the filing of the amended complaint herein, the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as trustee, wrongfully and unlawfully pursued each of the purposes and acts hereinafter more particularly set forth, and by such pursuit and acts have sought to consummate and make effective the wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, but at a particular time as to which these plaintiffs being without information, are unable to state, whereby said Trust Company in its corporate capacity proper was designing and intending to sequester,

take over and appropriate and convert as its own gain, advantage and profit the entire property and value of said trust estate of the value, to-wit: $85,000 to the wrongful and unlawful exclusion of these plaintiffs and all of the just lawful and proper beneficiaries of said trust estate; that in aid and advancement of said scheme and collusion, said Fidelity Trust Company in its coporate capacity proper, and with the knowledge, connivance and *and* consent of said trustee, and with the unlawful and wrongful acquies-ence, aid and assistance of said trustee, declared said trust agreement of date October 11, 1909, and the said several deeds executed concurrently therewith to be a mortgage and to that effect and in furtherance of said scheme and collusion said Fidelity Trust Company in its coporate capacity proper did on, to wit, the 24th day of March, 1913, wrongfully and unlawfully and maliciously and without probable cause therefore declare upon said trust agreement and said several deeds executed concurrently therewith as a mortgage executed by these plaintiffs to
231 said Fidelity Trust Company in its coporate capacity proper, and in denial of said instruments as a deed of trust executed by these plaintiffs to said Trust Company as trustee; and so declaring said Trust Company in its corporate capacity proper, did on the said date file in this cause the so-called cross complaint of said Fidelity Trust Company in its corporate capacity proper whereby and wherein said cross-complainant asked that said trust agreement and said deeds be adjudged to be a mortgage executed by these plaintiffs to said Fidelity Trust Company in its coporate capacity proper, and in denial of said instruments as a trust deed executed by these plaintiffs to said Trust Company as trustee, and further asking that upon such adjudication of said instruments to be a mortgage that said mortgage be adjudged to have been defaulted by these plaintiffs and then and there subject to foreclosure as a mortgate, and that the same be foreclosed as mortgages are foreclosed, and that said premises therein described, the same being the said trust estate be sold upon a certified copy of such decree as other lands are sold on execution, and cross complainant further prayed judgment for its proper costs and for all other proper relief in the premises.

That thereafter such proceedings were had in said cause as that on, to-wit, the 5th day of November, 1913, said Fidelity Trust Company filed its amended cross-complaint in this cause. That said amended cross-complain*ant* was both an amended and a supplemental cross-complaint and as a supplemental pleading it brought new matter into issue in this cause. That in said supplemental and amended cross-complaint, said Trust Company in its co-porate capacity
232 proper declared upon each of the following several items of payment, each as being outside of any beyond the terms of any trust agreement and particularly of the said trust agreement executed by and between these plaintiffs, and said Fidelity Trust Company as trustee, to-wit:

1. To payments to complete improvements on the separate lands of Dora E. Rooker and to pay for indebtedness incurred by her..... $9,966.43

2. To payments to carry on the business of farming and for the maintenance and care of the separate real estate of Dora E. Rooker 1,355.50

3. To payment Pinnell-Dulin judgment on Mechanics' Lien against the said real estate of Dora E. Rooker 381.63

4. To payment Daniel Neher judgment on Mechanics' lien against the separate real estate of Dora E. Rooker 325.00

5. To payment of indemnity fund to secure the Illinois Surety Co. as trustee on bond of Dora E. Rooker on appeal from Ludowici-Celadon, judgment, Hamilton Circuit Court..... 565.00

6. To Balke-Krause Co. on purchase and assignment of judgment on Mechanics' lien against the separate real estate of Dora E. Rooker..... 571.21

7. To payment of interest on prior mortgage loans on lands of Dora E. Rooker and the lands of Dora E. Rooker and William V. Rooker..... 3,028.45

8. To payment of taxes on lands of Dora E. Rooker and the lands of Dora E. Rooker and Wm. V. Rooker $1,058.95

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9. To payment of attorney's fees and expenses in defending suits to foreclose mechanics' liens on the lands of Dora E. Rooker..... 175.20

10. To payment of advertising and automobile hire in showing Marion County farm to prospective purchasers 15.44

11. To payments attorneys' fees in preparing contracts and deeds and examining titles..... 25.00

12. To payment of commission on moneys advanced... 150.00

13. To payment insurance premiums on land of Dora E. Rooker 95.00

14. To payment recorder's fees for deeds of land conveyed by Dora E. Rooker and by Dora E. Rooker and Wm. V. Rooker..... 3.20

15. To payment of continuation abstract of title on lands of Dora E. Rooker and Wm. V. Rooker.. 5.00

16. To payment of taxes on lands of Dora E. Rooker and Wm. V. Rooker in Marion Co., Ind..... 42.86

17. To payment of taxes on lands of Dora E. Rooker in Hamilton County, Indiana..... 136.29

18. To payment interest to American Central Life Ins. Co. on mortgage deed on lands of Dora E. Rooker 126.72

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19. To payment interest to Indianapolis Life Ins. Co. on mortgage deed on lands of Dora E. Rooker and Wm. V. Rooker..... 622.08

20. To payment Clerk Hamilton Circuit Court of Ludowici-Celadon judgment against lands of Dora E. Rooker 442.42

21. To payment of Clerk, Indiana Appellate Court costs Ludowici-Celadon judgment against lands of Dora E. Rooker 28.70

22. To payment commission to Fidelity Trust Company as trustee 3,251.35

23. To Attorneys' fees on foreclosure of mortgage of Fidelity Trust Company against the lands of Dora E. Rooker and against the lands of Dora E. Rooker and Wm. V. Rooker..... 1,500.00

That a bill of par*i*culars was attached to and filed with said amended cross-complaint purporting to show specifically each and every of the said items declared upon in said cross-complaint as having been paid out by the said Fidelity Trust Company in its co-porate capacity proper, and as constituting and comprising the consideration of the said mortgage to secure the said mortgage loan purporting to have been made by the said Fidelity Trust Company in its co-porate capacity proper to said Dora E. Rooker and to said Dora E. Rooker and William V. Rooker on their respective lands in Hamilton County and in Marion County, all in the State of Indiana. That said bill of particulars included each of the items specified in the exhibits following, to wit:

Payee.	Amount.
Indianapolis Mortar & Fuel Co.....	$60.00
Balke-Krause Co.....	1,000.00

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W. H. Johnson & Son Co.....	400.00
Fidelity Trust Co.....	350.00
Fidelity Trust Co.....	300.75
Pay roll, etc.....	300.00
Pay roll, etc.....	350.00
Pittsburgh Plate Glass Co.....	265.00
W. R. Evans Co.....	73.00
Daniel Stewart Co.....	60.88
Pay Roll, brick, etc.....	100.00

Payee.	Amount.
Humphreys & Sargents	400.00
Pay roll, time, etc.	85.00
Pay roll, farm	45.00
Western Brick Co.	20.00
Pay roll farm	25.00
Pay roll	35.00
Pay roll	25.00
Lilly & Stalnaker	300.00
W. H. Johnson *ccl.*, Co.	400.00
W. H. Johnson, *ccl.* Co.	50.00
Pay roll	35.00
Fidelity Trust Company notes	832.50
Pay roll	65.00
Pay roll	50.00
Hetherington & Berner	182.65
Stewart-Carey Glass Co.	2.66
Pay roll	45.00
Pay roll	62.50
Pinnell-Dulin judgment	384.63
George W. Keyser	100.00
Lacy Seed and Hay Co.	181.50
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Pay roll	62.50
Balke-Krause Co.	2,595.23
Pay roll	62.50
Pay roll	62.50
Pay roll	62.50
Pay roll	148.50
Pay roll	130.00
D. I. Neher, judgment	325.00
Pay roll	220.00
Citizens State Bank	1,473.76
Illinois Surety Co.	505.00
Am. Central Life Ins. Co.	120.75
Am. Central Life Ins. Co.	120.00
Am. Central Life Ins. Co.	120.00
Am. Central Life Ins. Co.	120.00
Am. Central Life Ins. Co.	120.00
Am. Central Life Ins. Co.	120.00
Am. Central Life Ins. Co.	126.72
Indpls. Life Ins. Co.	182.70
Indpls. Life Ins. Co.	180.00
Indpls. Life Ins. Co.	180.00
Indpls. Life Ins. Co.	565.00
Indpls. Life Ins. Co.	622.08
County Treasurer (Sahm auditor)	99.37
County Treasurer (Sahm auditor)	59.14
County Treasurer (Fishback)	11.60

Payee.	Amount.
County Treasurer (Fishback)	27.84
County Treasurer reemption	92.10
County Treasurer, Von Hake	27.36
County Treasurer, Bauchert	73.53
County Treasurer, Bauchert	64.35
237	
County Treasurer, Bauchert	159.34
County Treasurer, Best	111.34
Wall, Clerk, Ludowici judgment	442.42
France, Clerk, Ludowici, costs	28.70

That upon said amended cross-complaint said Fidelity Trust Company in its co-porate capacity caused and required issue to be joined in this cause and such proceedings thereafter to be had resulted in judgment and decree of this court adjudging said trust agreement and said deed executed concurrently therewith to be a mortgage and adjudging said mortgage to be in default and adjudging that said mortgage be foreclosed, and in decreeing the foreclosure of said mortgage and in ordering and directing that said real estate described in said trust agreement and in the deeds executed concurrently therewith be sold upon certified copy of such decree as other lands are sold on execution; that thereafter said Fidelity Trust Company in its co-porate capacity proper, caused and procured certified copies of said decree to be issued respectively to the sheriff of Marion County and to the Sheriff of Hamilton County and caused and procured said sheriffs respectively before advertising and selling said affected real estate in each of said counties; to cause the same to be appraised; that said Fidelity Trust Company in its co-porate capacity proper bid in said real estate at said respective sales and thereupon caused and procured said respective sheriffs to issue to said Fidelity Trust Company in its co-porate capacity proper the sheriff's certificate of purchase of said respective tracts of land in said respective counties; that upon the expiration of the year for redemption of said sales said Fidelity Trust Company in its co-porate capacity proper caused and procured said respective sheriffs to issue
238 their several sheriff's deeds conveying said land so sold aforesaid to said Fidelity Trust Company in its co-porate capacity proper; that said proceedings throughout were prosecuted maliciously and without probable cause by said Fidelity Trust Company in its co-porate capacity proper. That such prosecution of said action caused and required the said Dora E. Rooker and William V. Rooker to lay out and expend a large sum of money, to wit, $15,000 in and about the defense of said action on said cross-complaint; that said certificates of said sheriffs included the prosecution of and appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that in and by the opinion and judgment of said Circuit (Supreme) Court, the judgment of the Hamilton Circuit Court in the affected premises was wholly reversed

and set aside and held for naught, and said trust agreement was adjudged to be as it purports to be a trust agreement and not a mortgage; that by reason of the said malicious prosecution of said action and without probable cause therefor the said Dora E. Rooker and William V. Rooker have been damaged as upon the facts stated in this paragraph of supplemental complaint, in the sum of $15,000, for which sum they demand judgment upon this paragraph of supplemental complaint.

Par. 2. Dora E. Rooker and William V. Rooker, plaintiffs further complaining of grievances which have occurred to them since the filing of their original complaint herein, and for second paragraph of supplemental complaint say: that plaintiffs now here re-affirm each and every allegation in their original complaint and in
239 their amended complaint herein as of the several respective dates of said several respective pleadings; that since the bringing of this action the Fidelity Trust Company in its co-porate capacity proper and the Fidelity Trust Company as trustee, have wrongfully and unlawfully pursued and by such pursuit have sought to consummate and make effective a wrongful and unlawful scheme and collusion heretofore made and entered into by and between them but at a particular time at which these plaintiffs being without information are unable to state whereby said Trust Company in its co-porate capacity proper and for itself sequestered, took over, appropriated and converted as its own gain, advantage and profit the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and all other just, lawful and proper beneficiaries of said trust estate; that in aid and advancement of said scheme and collusion said Fidelity Trust Company in its co-porate capacity proper and with the knowledge and consent of said trustee and with the wrongful and unlawful acquiescense, aid and assistance of said trustee did declare said trust agreement of date October 11, 1909, and the said several deeds executed concurrently herewith to be a mortgage and to that effect and in furtherance of said scheme and collusion they did confederate and conspire together to cause and procure said trust agreement to be adjudged in this action to be a mortgage and as such mortgage to be foreclosed, and upon such foreclosure to order that said real estate described in said deeds of trust be sold as other lands are sold on execution; that in and by said proceedings said Fidelity Trust Company in its co-porate capacity wrongfully and unlawfully obtained to itself the legal title in fee simple to said real estate; that
240 while the said title to said real estate was in the said Fidelity Trust Company in its co-porate capacity proper, said Fidelity Trust Company caused and committed waste to said real estate and wrongfully and unlawfully permitted waste to be committed on said real estate to such extent and manner as that a scale house, granary and crib building on said Marion County lands was wholly destroyed to the damage of said lands $4,000; that the roof on the horse barn on said Marion County real estate was injured and impaired to such extent as to require a new roof to be placed thereon at a cost and

expense of $500; that the buildings on said Marion County land were permitted to go without painting or other protection against the elements to the injury of said buildings and said trust estate in the sum of $500; that 1,500 rods of fencing on said Marion County land was permitted to waste and be destroyed to the damage of said real estate $3,000; that on said Hamilton County lands 3,000 rods of fencing were permitted to waste and become destroyed to the damage of these plaintiffs and said trust estate in the sum of $6,000; that the barns and other buildings on said Hamilton County lands were permitted to waste and be injured by the elements to the damage of $3,500. That in all said trust estate was by reason of the said unlawful and wrongful conduct of the Fidelity Trust Company in its co-porate capacity proper of said Fidelity Trust Company as trustee conniving with and aiding and abetting its said co-defendant, wasted and damaged in the sum of $17,000.

Wherefore on this paragraph of complaint plaintiffs demand judgment in the further sum of $17,000.

241 Par. 3. Dora E. Rooker and William V. Rooker, plaintiffs further complaining of grievances which have concurred to them since the filing of their original complaint herein, and for their third paragraph of supplemental complaint say, that plaintiffs now here re-affirm each and every allegation contained in their original complaint and in their amended complaint in this cause as of the several respective dates of said several respective pleadings. That after the execution of said trust agreement and said deeds which were executed concurrently therewith by and between these plaintiffs and said Fidelity Trust Company as trustee but at a particular time to these plaintiffs unknown, and for that reason they are here unable to give the date thereof, said Fidelity Trust Company in its co-porate capacity proper and said Fidelity Trust Company as trustee, wrongfully and unlawfully and with the purpose and intent that said Fidelity Trust Company in its co-porate capacity proper might and should take over to itself as its own, made and entered into as between themselves a scheme and collusion to destroy the credit and capacity of these plaintiffs to protect themselves in said trust estate against any unlawful act and purpose on the part of said defendants and to that purpose and effect and in carrying out said confederacy and conspiracy between them, said defendants agreed that said Fidelity Trust Company should not furnish the money with which to maintain said property and to carry on the business conducted thereon. That in furtherance of said conspiracy and confederacy said defendants did not, nor did either of them furnish the necessary capital with which to maintain said farms and to operate them and to carry on the business conducted thereon; that

242 said trust estate then and there consisted of a large acreage of agricultural lands, to-wit: 350 acres. That by reason of the said wrongful and unlawful acts of the defendants in withholding the capital necessary to operate said lands and in declining and refusing to carry out said trust agreement said lands were permitted to go uncultivated and to be and remain idle to such extent as the

earning value thereof was impaired and destroyed to the extent of an average of $10 per acre on each of said lands, and for a period, towit of seven years, and in the aggregate, towit: $24,500.00.

Wherefore plaintiffs on this paragraph of supplemental complaint demand judgment in the sum of $24,500.00.

W. V. ROOKER,
Attorney for Plaintiffs.

243 DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY, as Trustee.

Motion to Strike Out.

The plaintiffs severally move the court to strike from the files in this cause the second amended counter claim of the Fidelity Trust Company as Trustee filed herein on towit, the 27" day of June, 1917, and for cause say: That said second amended counter claim is vague, indefinite and uncertain and tenders no issue; that in the nature of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of a quantum meriut with valuation as fixed by the said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement or (3) upon the single and definite theory of a quantum valebat founded upon acts done by the said defendant to the credit, use benefit and advantage of the said trust estate in the aggregate exceeding in value the damage suffered and sustained by the said trust estate because of any failure, omission or wrong done by said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust has accepted and appropriated to its own use, benefit and advantage.

And these plaintiffs say: That said second amended counterclaim avers facts inconsistent with and contradictory of the state-
244 ment therein "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed" and that because of such inconsistencies and contradictions, the said averment is nullified and destroyed, to-wit, the averment, "That said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed" and that in the premises there is no issue tendered by the said second amended counter claim that the said defendant is entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendant of any contract fixing any

liability whatsoever against these plaintiffs in favor of said defendant upon said counter-claim.

And these plaintiffs further say: that second amended counter-claim avers no fact in excuse of the failure on defendant's part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendant is entitled herein to employ said trust agreement to fix the value, as upon a quantum meruit, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement, and these plaintiffs say that in the premises there is no issue tendered by said second amended counter-claim that the said defendant is entitled to any recovery whatsoever, as upon an issue the quantum meruit, against these plaintiffs in favor of said defendants upon said counter-claim.

And these plaintiffs further say that said second amended counter-claim avers no fact founded upon acts done by said defendant to the credit, use, benefit and advantage of the said trust estate
245 in the aggregate exceeding in value the damage suffered and sustained by the said trust estate because of any failure, omission or wrong done by the said defendant to the damage of said trust estate and which said excess in value of benefits over damages the said estate has accepted and appropriated to its own use, benefit and advantage.

That upon the facts in the premises the said second amended counter-claim tenders no issue whatsoever in favor of said defendant and is useless and can accomplish no proper and lawful purpose in this cause and is a needless encumbrance of the record and should be stricken from the files herein.

And this these plaintiffs do ever pray.

W. V. ROOKER,
Attorney for Plaintiffs.

"And the plaintiffs' separate and several motions to strike out the counter-claim of the Fidelity Trust Company as trustee, are now overruled by the court which ruling plaintiffs at the time separately and severally except."

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

v.

FIDELITY TRUST COMPANY, as Trustee; FIDELITY TRUST COMPANY.

Motion to Strike Out.

246 The plaintiffs severally move the court to strike from the files in this cause the joint second amended counter-claim of the Fidelity Trust Company, as Trustee and the Fidelity Trust Company, in its co-porate capacity proper, filed herein to-wit, on the 27th day of June, 1917, and for cause say: That said joint second amended counter-claim is vague indefinite and uncertain and tenders no issue; that in the nature of the action said counter-claim should proceed upon either (1) single and definite theory of an accounting founded upon the full and complete performance by said defendants jointly of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by certain of the parties hereto, viz: these plaintiffs and said trustee, or (2) upon the single and definite theory of a quantum meruit with valuation as fixed by the said trust agreement and founded upon the partial and incomplete performance by said defendants jointly of the so-called trust agreement with such statements of facts as should excuse complete performance of said so-called trust agreement or (3) upon the single and definite theory of a quantum valebat founded upon acts done by the said defendants jointly to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefit over damages the said trust estate has accepted, retained and appropriated to its own use, benefit and advantage.

247 And these plaintiffs say that said joint second amended counter-claim avers facts inconsistent with and contradictory of the statement therein "that said cross-complaint has fully and duly performed all of the conditions on its part to be by it performed" and that because of such inconsistencies and contradictions, the said averment is nullified and destroyed, to wit, the averment "That said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed" and that in the premises there is no issue tendered by the said second amended counter-claim that the said defendants are entitled to any recovery

whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendants of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendants upon said counter-claim.

And these plaintiffs further say that said joint second amended counter-claim avers no fact in excuse of the failure on defendants part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendants are entitled herein to employ said trust agreement to fix the value, as upon a quantum meruit, of any or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement, and these plaintiffs say that in the premises there is no issue tendered by said joint second amended counter-claim, that the said defendants are entitled to any recovery whatsoever, as upon an issue the quantum meruit against these plaintiffs in favor of said defendants upon said counter-claimm.

248 And these plaintiffs further say that said joint second amended counter-claim avers no fact founded upon acts done by said defendants jointly to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by the said defendants to the damage of, said trust estate and which said excess in value of benefits over damages the said estate has accepted, retained and appropriated to its own use, benefit and advantage.

That upon the facts in the premises the said joint second amended counter claim tenders no issue whatsoever in favor of said defendants and is useless and can accomplish no proper and lawful purpose in this cause and is needless encumbrance of the record and should be stricken from the files herein.

And this these plaintiffs do ever pray.

W. V. ROOKER.
Attorney for Plaintiffs.

"And the plaintiffs separate and several motions to strike out the joint counter-claim of the Fidelity Trust Company and the Fidelity Trust Company as Trustee are overruled to which ruling plaintiffs at the time, separately and severally except."

"And the plaintiffs now file there separate and several demurrers to the counter-claim of the Fidelity Trust Company, as Trustee, which separate and several demurrers read as follows:

249 STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 15338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY, as Trustee.

Several Demurrers in Two Paragraphs.

1. The plaintiffs severally demur to the second amended counter-claim of the Fidelity Trust Company as Trustee, filed herein on to wit, the 27th day of June, 1917, and for cause as by their first paragraph of demurrer, say: That the facts stated in said counter-claim are not sufficient to constitute a cause of defense.

2. The plaintiffs further severally demur to the second amended counter-claim of the Fidelity Trust Company as Trustee, filed herein on to-wit the 27th day of June, 1917, and for cause, as by their second paragraph of demurrer, say: That the facts stated in said counter-claim are not sufficient to constitute a cause of action.

And for their memorandum filed with each of said several paragraphs of demurrer, stating wherein such pleading is insufficient for want of facts, these plaintiffs respectively say: That in the nature of the action said counter-claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instrument bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of *an*
250 quantum meruit with valuations as fixed by the said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of a quantum valebat founded upon acts done by the said defendant to the credit, use, and benefit and advantage of the said trust estate in the aggregate exceeding *the* value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by the said defendant to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate has accepted and appropriated to its own use, benefit and advantage.

And these plaintiffs say that said second amended counter-claim avers facts inconsistent with and contradictory of the statement therein "That said cross-complainant has fully and duly performed

all of the conditions on its part to be by it performed" and that because of such inconsistencies and contradictions, the said averment is nullified and destroyed, to-wit, the averment, "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed," and that in the premises there is no issue tendered by the said second amended counter-claim that the said defendant is entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendant of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendant upon said counter-claim.

And these plaintiffs further say that said second amended counter-claim avers no fact in excuse of the failure on defendant's part
251 to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendant is entitled herein to employ said trust agreement to fix the value, as upon a quantum meruit, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement and these plaintiffs say that in the premises there is no issue tendered by said second amended counter-claim that the said defendant is entitled to any recovery whatever, as upon an issue *the* quantum meruit, against these plaintiffs in favor of said defendant upon said counter-claim.

And these plaintiffs further say that said second amended counter-claim avers no fact founded upon acts done by said defendant to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by the said defendant to the damage of said trust estate and which said excess in value of benefits over damages the said estate has accepted, retained and appropriated to its own use, benefit and advantage.

W. V. ROOKER,
Attorney for Plaintiffs.

"And plaintiffs now file their separate and several demurrers to the joint counter-claim of the Fidelity Trust Company and the Fidelity Trust Company, as trustee, which separate and several demurrers read as follows:"

STATE OF INDIANA,
Hamilton County, ss:

252 In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY, as Trustee; FIDELITY TRUST COMPANY, in Its Co-porate Capacity Proper.

Demurrers.

1. The plaintiffs severally demur to the joint second amended counter claim of the Fidelity Trust Company, as Trustee, and the Fidelity Trust Company in its co-porate capacity proper, and for cause, as by their first paragraph of demurrer plaintiffs say: That several causes of action have been improperly joined.

2. The plaintiffs, further, severally demur to the joint amended counter-claim of the Fidelity Trust Company *a* as trustee and the Fidelity Trust Company in its co-porate capacity proper and for cause as by their second paragraph of demurrer plaintiffs say: That the facts stated in said counter-claim are not sufficient to constitute a joint cause of action in said defendants.

3. The plaintiffs, further, severally demur to the joint amended counter claim of the Fidelity Trust Company as trustee and the Fidelity Trust Company in its co-porate capacity proper and for cause as by their third paragraph of demurrer, plaintiffs say: That the facts stated in said counter claim are not sufficient to constitute a joint cause of defense.

And for their memorandum filed with each of said several paragraphs of demurrer, stating wherein such pleading is insufficient in each of the respects set forth in said several paragraphs of demurrer plaintiffs say:

253 That the exhibits filed with said counter-claim, which exhibits control the averments of said counter-claim, disclose, upon their face the existence of two separate and distinct interests, estates, capacities, and powers which as to each other are contradictory and adverse, in the defendants the Fidelity Trust Company on the one hand, as trustee, and the Fidelity Trust Company in its co-porate capacity proper on the other hand, viz: (1) Certain interests, estates, capacities and powers alleged to have been acquired and to be owned and held by said Fidelity Trust Company ex officio as trustee for each and all of these plaintiffs and of which interests and estates these plaintiffs are the equitable owners subject only to such rights in the premises as said trustee may have under color or by virtue of its office

and of which said capacities and powers these plaintiffs are the grantors, all as particularly set forth in two certain deeds of conveyance and one certain trust agreement executed in writing concurrently on to-wit the 11th day of October, 1909, and which said written instruments are exhibited and at large set forth in said counter-claim. (2) Certain interests, estates, capacities and powers alleged to have been acquired and to be held and owned by said Fidelity Trust Company in its co-porate capacity proper and not in its right ex officio as said trustee and of which interests and estates these plaintiffs never have been, are not now and never can be the owners equitably or otherwise as grantors to said Fidelity Trust Company in its co-porate capacity proper but which said interests and estates are adverse and hostile to the interests and estates of these plaintiffs and of said Fidelity Trust company ex officio as such trustee, in the premises; and of which capacities and powers

254 these plaintiffs are not the grantors, but on the contrary said capacities and powers are exclusive of these plaintiffs and arise out of the act of inco-poration of said Company and are created and conferred by law.

And these plaintiffs say that the said interests, estates, capacities and powers of said trustee ex officio arise out of the said contract executed in writing by and between these plaintiffs and said trustee, in form said deeds of conveyance and said trust agreement, and of date October 11, 1909, and, being so created, limited and defined, are such that they cannot, nor can any of them, be alienated from the welfare and cause of these plaintiffs, nor altered and amended without their consent, nor appropriated and converted by such trustee while acting under and within the terms, authority, province and purpose of said contract, without violating the terms of such contract in such manner and to such effect and extent as to deny to and defeat in said trustee the right to plead said contract and the performance thereof as the foundation and source of said trustees right to recover herein upon the terms of such contract.

And these plaintiffs say that the interests, estates capacities and powers of said Fidelity Trust Company in its co-porate capacity proper being derived from and conferred by law and not by contract with these plaintiffs, are alien, hostile and adverse to the cause of these plaintiffs and that these plaintiffs have not, nor has either of them now, or at any time heretofore any interest, estate, capacity or power within the function of said Fidelity Trust Company in its co-porate capacity proper.

255 And these plaintiffs say that by reason of the said distinctions and differences which exist between the interests, estates, capacities and powers ex officio of said trustee on the one hand and of said Fidelity Trust Company in its co-operate capacity proper on the other hand there is no identity, community and unity of right in the said respective interests, estates, capacities and powers such as would authorize, enable and permit said respective interests, estates, capacities and powers to be declared upon at one and the same time as the joint and common interests, estates, capacities and powers

of said trustee ex officio and of said Fidelity Trust Company in its own co-porate capacity proper.

And thereupon these plaintiffs say that for as much as the defendants assert solely and only a joint interest and an interest in common between them arising upon facts which in law deny and defeat any joint interest and any interest in common and in unity, and any common and single interest, estate, capacity and power, therefor- these plaintiffs say that neither of said defendants has stated facts in said counter claim which constitute either a cause of action or a cause of defense in either of said defendants severally or jointly.

And plaintiffs further say that if the court shall be persuaded that said counter claim states solely and only separate rights of action viz., right of action in said trustee ex officio on the one hand and right of action in said Fidelity Trust Company in its co-porate capacity proper on the other hand, then will the court order said misjoinders to be noted on the order book and cause as many separate actions to be docketed between the parties as there are
256 causes decided by the court to be improperly joined.

And plaintiffs further say: That in the nature of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the parties hereto or (2) upon the single and definite theory of a quantum meruit with valuations as fixed by the said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement or (3) upon the single and definite theory of a quantum valebat founded upon acts done by the said defendants to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate has accepted, appropriated and retained to its own use, benefit and advantage.

And these plaintiffs say that said second amended counter claim avers facts inconsistent with and contradictory of the statement therein "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed" and that because of such inconsistencies and contradiction, the said averment is nullified and destroyed, towit: The averment "that said cross-complainant has fully and duly performed all of the condi-
257 tions on its part to be by it performed," and that in the premises there is no issue tendered by the said second amended counter claim that the said defendants are entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendants of any contract fixing

STATE OF INDIANA,
County of Hamilton:

In the Hamilton Circuit Court.

Cause No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY et al.

Answer of Defendant to Plaintiffs' Supplemental Complaint.

Paragraph 1. The defendant, in answer to the first paragraph of the plaintiffs supplemental complaint says: that it denies each and every material allegation therein contained and set forth.

Paragraph 2. The defendant, in answer to the second paragraph of the plaintiffs supplemental complaint says: that it denies
259 each and every material allegation therein contained and set forth.

Paragraph 3. The defendant, in answer to the third paragraph of the plaintiffs' supplemental complaint says; that it denies each and every material allegation therein contained and set forth.

CHAS. E. COX,
HENRY SEYFRIED,
Attorney- for Defendant Fidelity Trust Company.

The defendant now files a second supplemental amended counter-claim which second supplemental counter-claim reads as follows:

STATE OF INDIANA,
County of Hamilton, ss:

In the Hamilton Circuit Court.

Cause No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY et al.

Supplemental Second Amended Counter Claim.

Paragraph 1. Comes now the defendant, Fidelity Trust Company in its co-porate capacity proper, and as trustee, and by way of supplemental second amended counter claim, complains of said plaintiffs, Dora E. Rooker and William V. Rooker, and further says:

any liability whatsoever against these palintiffs in favor of said defendants upon said counter claim.

And these plaintiffs further say that said second amended counter claim avers no fact in excuse of the failure on defendants' part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendants are entitled herein to employ said trust agreement to fix the value, as upon a quantum meruit, of any act or acts done or claimed to have been done by said defendants under and by virtue of said trust agreement, and these plaintiffs say that in the premises there is no issue tendered by said second amended counter claim that said defendants are entitled to any recovery whatever, as upon an issue quantum meruit against these plaintiffs in favor of said defendants upon said counter claim.

And these plaintiffs further say that said second amended counter claim avers no fact founded upon acts done by said defendant to the credit, use, benefit, and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by the said defendants to the damage of said trust estate and which said excess in value of benefits over damages the said estate has accepted, retained and appropriated to its own use, benefit and

258 advantage.

W. V. ROOKER,
Attorney for Plaintiffs.

"And afterwards to-wit on the 29th day of May, 1918, the same being the 51st Judicial Day of the April term, 1918, of said court, the following further proceedings were had in said cause, to-wit:"

"Comes now the parties and the separate and several demurrers of plaintiffs to the counter claim of the Fidelity Trust Company are now overruled, to which ruling the plaintiff- at the time separately and severally except and the separate and several demurrers to the joint counter claim of the Fidelity Trust Company are now overruled to which ruling the plaintiffs at the time separately and severally except. And the defendant now files answer of general denial to each paragraph of supplemental complaint which answers of general denial read as follows:

That they now re-affirm each and every allegation in its original second amended counter claim contained, and further say that since the preparation of said second amended counter claim, it did let out and expend for the purpose of discharging liens and charges against said real estate in said second amended counter claim de-
260 scribed, pursuant to and under the provisions of the deed of trust and memorandum of trust, in said second amended counter claim set forth, the following amounts to-wit:

On June 14, 1917 in payment of the taxes for the forty acres of land in Washington Township, $39.86; on June 14, 1917 in payment of the taxes on the land situated in Lawrence Township, $87.46; on April 3, 1918, in payment of the taxes on the land situated in Washington Township, $18.48; on April 3, 1918, in payment of the taxes on the land situated in Lawrence Township, $34.40; on June 16, 1917 for taxes on the Hamilton County lands, $447.78 and on April 11, 1918 for taxes on the same lands $198.75; on September 7, 1917 for fire insurance on the buildings, $136.50; on February 7, 1918, to the Indianapolis News for advertising notice of sale of Marion County farm, $14.28; and on the same day to the Indianapolis Star for the same notice, $7.36, a copy of which vouchers are filed herewith, made part hereof, and marked numbers 101 to 109 inclusive. That all said moneys were advanced by the Fidelity Trust Company out of its own funds, and remain unpaid with interest thereon.

Wherefore this defendant prays for an accounting and judgment for the amount due, and all other proper relief.

Paragraph 2. For a second and further paragraph by way of supplemental counter claim, this defendant complains of the plaintiffs Dora E. Rooker and William V. Rooker and further says: that while the plaintiffs herein, since the commencement of their original action and since the filing of the last counter claim of this defendant herein have contended before this court, that the deeds of conveyance and the memorandum of trust executed contemporaneously
261 therewith constitute a trust estate and vest the title to the lands in the defendant, Fidelity Trust Company, as trustee, with the power vested in this defendant, as trustee, to sell the same according to the provisions of the trust, and have complained because the lands were not sold, yet notwithstanding that fact, they have ever since the filing of the defendant's second amended counter claim, outside of this court, openly claimed and asserted a proprietory interest in said lands and asserted title thereto and denied this defendant's right, as trustee, to sell and convey the same pursuant to and for the purposes enumerated in said memorandum of trust.

And this defendant shows to the court that said plaintiffs Dora E. Rooker and William V. Rooker after the rendition of the judgment in this court on the original complaint and cross complaint of the parties, namely on May 26, 1916 filed against this defendant in the Marion County Circuit Court, their complaint, in statutory form, to quiet the title in them to said Marion County lands. That on June 4, 1916, they filed a second paragraph of complaint in said cause, followed by other pleadings on part of both parties.

That after said original cause referred to was reversed in the Supreme Court, said plaintiffs still pursued and pressed said action in the Marion County Circuit Court to quiet their title, whereupon this defendant on June 23, 1917 filed its cross-complaint setting up its title, as trustee, to said Marion County Lands under the deed of trust and memorandum of trust set forth in the pleadings in this cause and praying for an injunction enjoining the plaintiffs in said action,

262 Dora E. Rooker and William V. Rooker, from denying or disputing this defendant's title, as trustee, to said lands, and from denying, disputing, obstructing or interfering with the sale of said lands, by said trustee, under and pursuant to its power of sale. That afterwards on October 4, 1917 said cause was submitted to the Marion County Circuit Court for trial, finding and judgment, and a special finding of facts and conclusions of law having been requested by the plaintiffs in said action, the court on December 4, 1917 filed its special findings and conclusions of law and thereafter on February 5, 1918 entered judgment upon the special findings and conclusions of law, by which judgment said court adjudged the sheriff's sale of said Marion County real estate made under the decree of foreclosure rendered on the original judgment in this cause as null and void and of no effect, and further adjudged that this defendant Fidelity Trust Company, as trustee, under and pursuant to the deed of trust referred to, as such trustee, is the owner in fee simple, as trustee, of said Marion County lands with full power to sell and convey the same in accordance with the provisions of said deed of trust by which it was conveyed to this defendant, as trustee, by the plaintiffs herein and that all the claims of the plaintiffs in said action were unfounded, and that the title thereto of this defendant Fidelity Trust Company, as trustee, under said deed of trust, be quieted and forever set at rest, and that the plaintiffs, Dora E. Rooker and William V. Rooker, be perpetually enjoined from denying or disputing the title of said Fidelity Trust Company, as trustee, to said lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee, under and pursuant to its power of sale.

263 That after the rendition of said judgment, and the granting of said injunction, the plaintiffs prayed an appeal to the Supreme Court, and sixty (60) days' time was given to file bills of exception, and the appeal prayed for, granted, upon filing bond in the sum of $5,000.00; that no bill of exceptions or bond was filed in said cause, but on May 15, 1918 the plaintiffs, Dora E. Rooker and William V. Rooker, ordered a transcript in said cause, for appeal to the Supreme Court, all for the purpose of hindering and obstructing the sale of said Marion County lands by this defendant pursuant to and under the provisions of the trust created by the plaintiffs.

And this defendant now further shows to the court that it has given notices of the sale of said Marion County lands pursuant to the provisions of and in accordance with the terms of said agreement of trustee referred to, by serving a ninety (90) day notice in writing upon the plaintiffs, Dora E. Rooker and William V. Rooker, and

then publicly advertising said Marion County lands for sale in the Indianapolis News and Indianapolis Star, four weeks successively, once a week.

That while several inquiries were made by prospective purchasers this defendant was unable to secure the purchaser on account of the widespread rumors afloat in the community, that this defendant, as trustee, would be unable to give peaceful possession to a purchaser of said lands, which rumors to that effect are the result of the conduct of the plaintiffs herein.

And this defendant further shows to the court that the plaintiffs still retain possession of all said lands and enjoy the profits
264 thereof, without paying any obligations, charges or even taxes, and that said Marion County lands are incumbered with a mortgage given to secure a loan of $6,000.00 made by the plaintiffs herein, prior to the conveyance of said lands to this defendant, as trustee, and that said mortgage with several years interest thereon remains unpaid, and that said Marion County lands will not sell by far, for enough to pay off said mortgage and the moneys advanced by this defendant, and that it will be necessary to sell both the Marion County and Hamilton County lands in order to pay and discharge the amounts advanced as hereinbefore shown.

And this defendant shows to the court that the plaintiffs herein are in like manner also claiming an interest in said Hamilton County lands and are asserting and attempting to assert and claim title to the same, which said interest so claimed by said plaintiffs herein is adverse to this defendant's claim and title to said real estate, as trustee, under and pursuant to the deed of trust and memorandum of trust executed by the plaintiffs, and that the claim of said plaintiffs is unfounded, and without right, and is a cloud upon this defendant's title, as trustee, to said real estate, and that this defendant, as trustee, is the owner of and entitled to have its title as trustee, quieted and forever set at rest in and to said lands, situate in Hamilton County, Indiana, and described as follows:

All the west half of the north half of section 18, township 18 north, range 5 east, lying west of the Lake Erie and Western Railroad, containing 92 acres more or less.

Also the southwest quarter of section 7, township 18 north,
265 range 5 east, lying west of the Lake Erie and Western Railroad and east of White River, containing 48 acres more or less.

Also the southeast quarter of section 12, township 18 north, range 4 east, containing 60 acres, more or less and lying south and east of White River.

Also that part of the northeast quarter of section 13, township 18 north, range 4 east more particularly described as follows:

Beginning at the northeast corner of said section and running thence west with said section 132 rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 — ; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing 75 acres more or less.

And this defendant further shows to the court that the plaintiffs herein will interfere with, hinder and obstruct any attempted sale of said Hamilton County lands, by this defendant, as trustee, although such sale be attempted to be made under and pursuant to the powers and in strict compliance with the provisions contained in said deed of trust and memorandum of trust, and that unless they be enjoined from interfering with, hindering and obstructing such sale, this defendant, as trustee, will be powerless to exercise and discharge the power of sale conferred upon it as such trustee. In consideration thereof this defendant says: that the sales of the lands under and in pursuance *to* the powers and in compliance with the
256 provisions of said trust, should be made by this defendant, as trustee, under the order and guidance of this court and that without said aid and assistance of the court, by reason of plaintiffs' action, as aforesaid, no advantageous sales can be made, and further, that if a sale is made, the plaintiffs will refuse to give possession of the lands unless the court by its order grant its assistance.

Wherefore this defendant prays the court that its title in and to said Hamilton County lands may be forever quieted, and that upon judgment being rendered herein the court also enjoin the plaintiffs from denying or disputing the title of this defendant as trustee, to said Hamilton County lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee, under and pursuant to its power of sale contained in the deed and memorandum of trust, executed by the plaintiffs herein to this defendant, as such trustee, and that the court enter its order and decree directing the sale of said Marion County and Hamilton County lands, and for all other appropriate equitable relief as to the court may seem just and necessary.

CHAS. E. COX,
HENRY SEYFRIED,
Attorneys for Defendant Fidelity Trust Company.

Receipt No. 101.

Duplicate No. 4774.

Washington Township.

Treasurer's Office.

Indianapolis, Ind., ——— ——, 1917.

Received of Fidelity Trust Company Principal, Penalty,
257 Interest and costs of Taxes, Delinquent for the Year 1916 on Account of State, County and Township on the following described property:

Description.	Acres.	Lot.	Sq. or blk.	Exemption.	Personal.	Poll.
24.						
E. ½ N. E. ¼ 33-17-4	10	...	...	...	...	6/14

Net valuation, 2400.

Amt. to Pay.

Tax	39.86
Pen.	.....
Costs	.....
Total	$39.86

No. 101.

Receipt No. 37.

Duplicate No. 11499.

Lawrence Township.

Treasurer's Office.

Indianapolis, Ind., —— —, 1917.

Received of Fidelity Trust Company Principal, Penalty, Interest and Cost of Taxes, Delinquent for the Year 1916, on Account of State, County and Township on the following described property:

Description.	Acres.	Poll.	Valuation.
S. W. ¼ N. W. ¼ 34-17-4..... 225-12.	10	6 14	3,500

Amount to Pay.

Tax	86.96
Pen.	.....
Costs	.50
Total	87.46

No. 102.

Receipt No. 532.

Washington Township.

Treasurer's Office.

Indianapolis, Indiana, —— —, 1918.

268 Received of Fidelity Trust Company for the first installment of State, County and Township Taxes on the following described property:

Description.	Acres.	Net valuation.	Amt. to pay.
35-36. N. E. ¼ 33-17-4.....	10	2,100	18-48

No. 103.

Receipt No. 195.

Duplicate No. 11025.

Lawrence Township.

Treasurer's Office.

Indianapolis, Ind., —— —, 1918.

Received of Fidelity Trust Co., for first installment of State County and Township Taxes on the following described property:

Description.	Acres.	Net valuation.	Amt. to pay.
260-8.			
N. W. ¼ 37-17-4.....	40	3,500	34.40

No. 104.

Delinquent Taxes for 1916.

Treasurer's Office.

Noblesville Twp.

Noblesville, Ind., 6-16, 1917 $447.78.

No. 262.

Received of Fidelity Trust Co. the sum of Four hundred forty seven dollars and seventy eight cents, in full for State, County, School, Special School Township, Gravel Road Construction and Road Tax, delinquent for year 191-, on Personal Property, Poll, and on the following described real estate:

Description of land.	Sec.	Town.	Range.	Acres.	Hund.
S. E.	12	18	4	59	60
269					
S. W.	7	18	5	48	..
S. W.	18	18	5	91	50
N. E.	13	18	4	65	..

L. F. HEINY,
Treasurer of Hamilton County.

No. 105.

Receipt No. 268.

Tax, $198.75.

Noblesville Township, Road Tax Balance.

Noblesville, Hamilton County, Ind., 4-11, 1918.

Received of Fidelity Trust Company, the sum of One Hundred & Ninety Eight .75 Dollars in full for the first installment of State, County, Township and corporation Taxes for the year 1917 on $8— of, and the following described real estate:

Description.	Sec.	Twp.	Range.	Acres.	Hds.	Net valuation of R. estate.
S. E.	12	18	4	59	60	15,900
S. W.	7	18	5	48	..	.....
N. W.	18	18	5	91	50	.....
N. W.	13	18	4	..	..	.....

J. B. AUSTIN,
Treas. Hamilton County.

No. 106.

Fidelity Trust Co., Tr. (Rooker), in Account with Fidelity Trust Company.

Indianapolis, Aug. 10, 1917.

8-18-17. Caledonian #2821619 Amt. $8,000.00, Prem..	$96.00
8-18-17. Glober & Rutgers #1094877 2700.00.....	40.50
	$136.50

Paid April 17/17.
No. 107.

270 To the Indianapolis News, Dr.

Account Fidelity Trust Co.

Date.	Description.	Times.	Rate.	Amount.
15	Dora E. Rooker.....	1	$8\frac{1}{2}$	14.28

Tues. Legal Notice.
Paid Feby. 7, 1918.
No. 108.

The Indianapolis Star.

Fidelity Tust Co., 118 E. Market St., City, to Star Publishing Company, Dr., for Classified Advertising, Month Jan.-Feb., 1918.

Date.	Description.	Lines.	Times.	Agate.	Rate	Amt.
Jan. 16, 23, 30, and Feb. 6...	Legal notice..	46	4	184	4	7.36

Sale of Marion Co. farm *by* pursuant to trustee's deed. Rooker Farm.
Paid Feb. 7, 1918.
No. 109.

"And the plaintiff now files partial reply to the counter claim of the Fidelity Trust Company in its co-porate capacity which partial reply reads as follows:"

STATE OF INDIANA,
County of Marion, ss:

In the Hamilton Circuit Court, October Term, 1917.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY et al.

Partial Replies.

1. Dora E. Rooker and William V. Rooker, plaintiffs, for their partial replies to so much of the counter claim herein of the Fidelity Trust Company in its co-porate capacity proper, as asserts a
271 right in said Trust Company in said capacity, deny each and every allegation therein contained. Wherefore plaintiffs demand judgment as in their complaint prayed.

Par. 2. Dora E. Rooker and William V. Rooker, plaintiffs for their further partial defense to the counter-claim of the Fidelity Trust Company in its co-porate capacity proper, and for second paragraph of reply to so much of said counterclaim as sets up and declares upon a certain mortgage described as a mortgage executed by these plaintiffs to the American Central Life Insurance Company, say that there are two other separate actions pending upon said cause of action between these plaintiffs and said defendant in its co-porate capacity proper; that one of these said actions is entitled Dora E. Rooker, et al. vs. American Central Life Insurance Company, Cause No. 23526, in the Marion Circuit Court of Indiana;

that in said cause said Fidelity Trust Company in its co-porate capacity proper intervened and so intervening has set up its cross-complaint declaring upon said mortgage as a mortgage owned by said Fidelity Trust Company in its co-porate capacity proper, and asking that said mortgage be foreclosed as against the premises therein described, that the second of said actions pending is an action instituted by the Fidelity Trust Company in its corporate capacity proper and now pending in this court, the same being Cause #16755; that in its complaint in said action said Fidelity Trust Company in its co-porate capacity proper declares upon said mortgage as a mortgage owned by said Trust Company in its corporate capacity proper, and in its complaint in said action said Trust Company asks that said mortgage be foreclosed and the premises therein described be sold as other lands are sold on execu-
272 tion; that each of said actions pending is an action for the foreclosure of said mor-gage by said Fidelity Trust Company in its corporate capacity proper, and as a mortgage outside of and beyond the terms of this trust agreement; that each of said actions was begun long prior to the filing of the second amended counter claim herein.

Wherefore plaintiffs demand judgment as in the complaint prayed.

W. V. ROOKER,
Attorney for Plaintiffs.

"Said defendant also files partial reply to the counter-claim of Fidelity Trust Company as trustee, which partial reply reads as follows:"

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

v.

FIDELITY TRUST COMPANY, as Trustee, et al.

Replies to Trustee.

1. Dora E. Rooker and William V. Rooker, plaintiffs, for their separate and several partial defenses to so much of the second *maneded* counter claim as is made by the defendant in its capacity as trustee, and as first paragraph of plaintiffs several, separate and partial replies thereto, respectively, say: That they severally deny each and every allegation contained in said second amended counter claim of said defendant as trustee save and except so much thereof

as in this paragraph of partial reply is expressly admitted
273 to be true and for their express admissions these plaintiffs say that it is true that on the 11th day of October 1910, they executed with and to the defendant as trustee, in writing their certain instrument called a trust agreement and concurrently therewith and as part thereof their certain deeds of conveyance of certain described lands to the defendant as trustee, and that said trust agreement and said deeds of conveyance were the same trust deed and agreement and trust deeds which are transcribed into and exhibited by said second amended counter claim.

Wherefore plaintiffs demand judgment as in their complaint prayed.

2. Dora E. Rooker and William V. Rooker, plaintiffs for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as second paragraph of plaintiffs' separate and partial replies thereto, respectively say: That neither of the following described written instruments exhibited with and made a part of said second amended counter claim is the act or deed of this plaintiff to-wit: Exhibits Nos. 1 to 52, both numbers included, the same being more particularly designated as follows, viz:

Voucher No.	Payee.	Date.	Amount.
1.	Indianapolis Motor & Fuel Co.	Sept. 10, '09	$60.00
2.	Balke & Krause Co.	Oct. 13, '09	1,000.00
3.	W. H. Johnson *ect.* Co.	Oct. 13, '09	400.00
4.	Fidelity Trust Co.	Oct. 14, '09	350.00
5.	Fidelity Trust Co.	Oct. 16, '09	300.75
6.	Pay roll, *ect.*	Oct. 16, '09	300.00
274			
7.	Pay roll, *ect.*	Oct. 22, '09	350.00
8.	Pittsburgh Plate, *ect* Co.	Oct. 30, '09	265.00
9.	W. R. Evans Co.	Nov. 9, '09	73.00
10.	Daniel Steward Co.	Nov. 13, '09	60.88
11.	Pay roll, *ect.*	Nov. 27, '09	100.00
12.	Humphreys et al.	Nov. 24, '09	400.00
13.	Pay roll, *ect.*	Dec. 4, '09	85.00
14.	Pay roll, *ect.*	Dec. 11, '09	45.00
15.	Western Brick Co.	Dec. 10, '09	20.00
16.	Pay roll, *ect.*	Dec. 18, '09	25.00
17.	Pay roll, *ect.*	Dec. 24, '09	35.00
18.	Pay roll, *ect.*	Dec. 31, '09	25.00
19.	Lilly & Stalnaker	Dec. 31, '09	300.00
20.	W. H. Johnson *ect* Co.	Dec. 31, '09	400.00
21.	W. H. Johnson *ect* Co.	Jan. 6, '09	50.00
22.	Pay roll, *ect.*	Jan. 15, '10	35.00
23.	Fidelity Trust Co.	Jan. 31, '10	832.00
24.	Pay roll *ect.*	Jan. 31, '10	65.00

Voucher No.	Payee.	Date.	Amount.
25.	Pay roll	Feb. 15, '10	50.00
26.	Hetherington et al	Feb. 25, '10	182.65
27.	Stewart-Carey *cct* Co	Feb. 25, '10	2.66
28.	Pay roll *cct*	Feb. 28, '10	45.00
29.	Pay roll *cct*	March 31, '10	62.50
30.	Pinnell Dulin	April 7, '10	384.63
31.	Geo. E. Keyser	Feb. 24, '10	400.00
32.	Lacy Seed *cct* Co	April 11, '10	184.50
33.	Pay roll *cct*	April 15, '10	62.50
34.	Balke-Krause Co	April 18, '10	2,595.23
35.	Pay roll	April 29, '10	62.50
36.	Pay roll	May 11, '10	62.50
275			
37.	Pay roll	May 28, '10	62.50
38.	Pay roll	June 15, '10	148.50
39.	Pay roll	June 30, '10	130.00
40.	D. I. Neher	June 24, '10	325.00
41.	Pay roll *cct*	July 15, '10	220.00
42.	Citizens State Bank	May 11, '10	1,581.84
43.	Illinois Surety Co	Aug. 26, '10	505.00
44.	Am. Central Life	Nov. 27, '10	420.75
45.	Am. Central Life	May 3, '10	420.00
46.	Am. Central Life	Nov. 19, '10	420.00
47.	Am. Central Life	May 1, '10	420.00
48.	Am. Central Life *N*	Nov. 17, '10	420.00
49.	Am. Central Life	May 19, '11	420.00
50.	Indianapolis Life Ins. Co	Dec. 10, '09	182.70
51.	Indianapolis Life Ins. Co	April 16, '10	180.00
52.	Fidelity Trust Co	Oct. 16, '09	393.20

Dora E. Rooker and William V. Rooker being severally duly sworn upon their respective oaths say: That the facts stated in this paragraph of reply are true.

And further affiant saith not.

DORA E. ROOKER.
WILLIAM V. ROOKER.

Subscribed in my presence and sworn to before me this 23rd day of October, 1917. Witness my hand and official seal.

HAZEL CHRISTIAN,
Notary Public.

Com. Ex. Aug. 7, 1920.

Wherefore, plaintiffs demand judgment as in the complaint prayed.

4. Dora E. Rooker and William V. Rooker, plaintiffs for the further separate and several partial defense to so much of
276 the second amended counter-claims as is made by the defendant in its capacity as trustee and as third paragraph of Plaintiffs' several and separate partial replies thereto, respectively say:

That the demands sued on and set forth in said second amended counter-claim were fully paid before the bringing of this action.

Wherefore plaintiffs demand judgment as in the complaint prayed.

5. Dora E. Rooker and William V. Rooker plaintiffs for their further separate and several partial defenses to so much of the
277 second amended counter claim as seeks to recover a trustee's fee of one hundred and fifty dollars and a commission of two per cent. together with interest at six per cent computed semi-annually and together with attorney's fees and other charges and expenses as set forth in said second amended counter claim for the term of one year and during which time said contract was and was to be executory, these plaintiffs severally say that said compensation is unlawful and usurious for that said obligations on the part of these plaintiffs *was*, as more particularly appears from said trust agreement, a copy of which marked exhibit A is filed with the amended complaint herein: ever upon the express condition following to-wit:

A. Said defendant as Trustee promised and agreed in consideration of said compensation to furnish the moneys and means with which to complete said dwelling house and out buildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, all to be duly completed and installed and to furnish the moneys and means necessary to the true and better and complete performance of said contract of trust and to the successful maintenance of an- care for said real estate and the business thereon conducted.

B. Said defendant as trustee promised and agreed to obtain from other banks and bankers upon the promissory notes of said Dora E. Rooker such sum or sums of money over and above the sum said defendant trustee was to furnish out of its moneys and means, as should be necessary to complete said dwelling house and out buildings appurtenant thereto and other necessary and proper structures,
278 and to equip the same with modern utilities and conveniences, all to be duly completed and installed: and to that end said defendant trustee obligated itself and it became and was its duty to protect the credit of said Dora E. Rooker generally and particularly at banks.

C. Said defendant as trustee obligated itself and it became and was its duty to protect said real estate and said trust estate against waste and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and against said property.

D. That said defendant as trustee obligated itself to begin within the period of one year after the expiration of said trust agreement to reduce said trust estate to cash and to administer said trust and liquidate its credits and debits in the form and manner prescribed in said contract.

E. That said defendant as trustee obligated itself to strict fidelity to said trust estate and to the said Dora E. Rooker and William V. Rooker all to the end that the interests of said trust estate would thereby be the better conserved and said trust the more prudently and advantageously administered.

Yet notwithstanding the said duties and obligations of said defendant trustee, which it was to do and perform in consideration of and as its compensation to said Dora E. and William V. Rooker for said rates, fees, commissions and charges, said defendant trustee failed, neglected and refused to furnish the moneys and means with which

to complete said dwelling house and out buildings appur-
279 tenant thereto, and other necessary and proper structures, and

to equip the same with modern utilities and conveniences, the same to be duly completed and installed, and said defendant trustee failed, neglected and refused to furnish the moneys and means necessary to the true and better and complete performance of said contract of trust and to the successful maintenance of and care for said real estate and the business thereon conducted.

That said defendant trustee failed, neglected and refused to obtain money from other banks and bankers upon the promissory notes of said Dora E. Rooker and failed, neglected and refused to protect and preserve the credit at bank of said Dora E. Rooker to the end that she might obtain such sum or sums of money over and above the sum said defendant trustee was to furnish out of its moneys and means as should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, so that the same should be duly completed and installed, but on the contrary, said Fidelity Trust Company in its corporate capacity proper and with the knowledge and consent of said trustee unlawfully and without right set about to appropriate and convert to itself said trust estate and the better to accomplish such *such* unlawful purpose, it set about to injure and destroy the credit at banks of said Dora E. Rooker and William V. Rooker and to that end it persistently baffled and annoyed such banks, as the said Dora E. Rooker and William V. Rooker had theretofore satisfactorily done

business with and there by said Trust Company, with the
280 knowledge consent and participation of said trustee greatly impaired and wholly destroyed the credit of said Dora E. Rooker and William V. Rooker at said banks.

That said defendant trustee wholly failed, neglected and refused to protect said real estate and said trust estate against waste, and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and against said property; but, on the contrary, said defendant trustee allowed taxes on said real estate to become delinquent, and allowed said prop-

city to go without insurance, and refused to pay the written orders of said Dora E. Rooker for sums justly due to claimants against said trust estate, and caused and procured said claimants to file notices of mechanic liens against said trust estate, and to sue thereon and reduce the same to judgment with attorneys' fees and costs, and to assign such judgments to said Trust Company in its said corporate capacity proper.

That said defendant trustee wholly neglected, failed and refused to begin with the terms of one year to reduce said trust estate to cash and to liquidate said trust in the form and manner prescribed in said contract; but on the contrary, said defendant Trust Company trustee under the domination and control of such trust company in its corporate capacity proper for the unlawful uses and purposes of said Trust Company as aforesaid repudiated its said duties of fidelity and trust, and gave to these plaintiffs notice in writing of such repudiation a copy of which marked "Exhibit No. 1," is filed with
51 the complaint herein; that said Trust Company and said trustee tendered back said estate grossly wasted and heavily encumbered and thereupon demanded that these plaintiffs pay forthwith in money the demands of said Trust Company as a mortgagee; that said notice of repudiation of said trust was served on these plaintiffs before the bringing of this suit.

That by reason of the premises said defendant trustee has forfeited and waived the consideration upon which it might lawfully demand the collection of the interest, rates, commission, fees and charges mentioned in said trust agreement and by reason thereof said compensation which it now demands is unjust, usurious and unlawful.

Wherefore plaintiffs demand judgment as in the amended complaint prayed and that in any decree made and entered herein that no interest in excess of six per cent per annum be computed in favor of any payment made by said defendant trustee upon its said demand, and they pray for all proper relief.

6. Dora E. Rooker and William V. Rooker, plaintiffs, for their separate and several partial defenses to so much of the second Amended Counter Claim as is made by the defendant in its capacity as trustee and as sixth paragraph of plaintiffs' several, separate and partial replies thereto respectively say; that as to so much of said second Amended Counter Claim as seeks to recover on account of taxes paid by said defendant as trustee, said claim should be disallowed in the form and manner as presented in said second
52 Amended Counter Claim and that said items as for taxes should be made the subject of an accounting by the court and that each of said items should be reduced, together with the aggregate thereof at least fifty per cent for the reason that the obligations of said trust estate and the obligations of these plaintiffs to repay such sums as such Trust Company as trustee might and should lay out and expend for taxes was an obligation ever upon the condition that such expenditure should be made by said Trust Company as trustee to perform and the better to perform the trust created in

and by its certain contract dated October 11th, 1909, a copy of which contract marked "Exhibit A" is filed with the amended complaint herein; that the trust created by said contract was one calling for diligence and fidelity on the part of said Trust Company as trustee; that said Trust Company as trustee wrongfully disregarded its duty in the premises and for purposes of its own failed and refused to pay such taxes before the same became delinquent and penalties were imposed thereon; that each of said items is because of said delinquency excessive in the sum and amount of to wit, fifty per cent; that such delinquency was not the fault or delinquency of these plaintiffs, or either of them, but was solely the fault and delinquency of said Trust Company as trustee and an act of abuse and maladministration on its part of said trust for which these plaintiffs are in no wise responsible, and for which said trust estate should not be held liable.

Wherefore, these plaintiffs demand judgment as in the amended complaint prayed and that an accounting be had and taken of said taxes paid, and that in any allowance made to said Trust
283 Company as trustee on account of said taxes paid that only such principal sums be allowed as were the principal sums of said taxes before delinquency and before penalties were attached thereto, and plaintiffs pray for all proper relief.

7. Dora E. Rooker and William V. Rooker, Plaintiffs for their separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as seventh paragraph of plaintiffs' several separate and partial replies thereto, respectively say; that as to so much of said second amended counter claim as seeks to recover on account of interest paid on prior mortgage liens to the Indianapolis Life Insurance Company and to the American Central Life Insurance Company, these plaintiffs say that said claims should be disallowed in the form and manner as presented, and that an accounting should be had with respect thereto, and that upon such accounting only such principal amount should be allowed as was the principal sum of such interest debt before default and delinquency; that there was a default and a delinquency in the payment of such interest charges and thereupon penalties were attached in the manner and form of eight per cent interest; that such penalties are not nor were they ever the debt or default of these plaintiffs or either of them, but such penalties were the debt and default of said defendant as trustee for that the obligation of these plaintiffs and of said trust estate to repay such sums as said trustee might and should lay out and expend in interest on said prior mortgage liens was an obligation ever
284 upon the condition that such expenditures should be made by said trustee to perform and the better to perform the trust created in and by the contract of said trustee and these plaintiffs dated October 11th, 1909, a copy of which contract, marked "Exhibit A" is filed with the complaint herein; that said trust was one calling for diligence and fidelity on the part of said trustee; that said trustee wrongfully disregarded its duties in the premises and for

purposes of its own failed and refused to pay such interest charges before the same became delinquent, and penalties were imposed thereon; that each of said items is because of such delinquency excessive in the sum and amount of two per cent; that such delinquency was not the fault or delinquency of these plaintiffs or either of the ——, but was solely the fault and delinquency of the trustee and an act of abuse and mal-administration on its part of said trust estate for which these plaintiffs are in no wise responsible, and for which said trust estate should not be held liable.

Wherefore, these plaintiffs demand judgment as in the amended complaint prayed for, that an accounting be had and taken of said interest charges paid, and that in any allowance made to said defendant as trustee on account of interest charges paid that only such principal sums be allowed as were the principal sums of such interest charges before delinquency and before penalties were attached thereto, and plaintiffs pray for all proper relief.

8. Dora E. Rooker and William V. Rooker plaintiffs, for their separate and several partial defenses to so much of the
285 second amended counter claim as is made by the defendant in its capacity as trustee and as eighth paragraph of plaintiff's several, separate and partial replies thereto, respectively, say: That as to so much of said second amended counter claim as seeks to recover the principal sum of four hundred dollars specified in said second amended counter claim and the exhibits filed therewith as a payment made to George W. Keyser, voucher 31, February 24, 1910, upon the written order of Dora E. Rooker on account of plumbing done in the erection and construction of dwelling house of the said Dora E. Rooker, these plaintiffs say that said claim should be wholly disallowed as set off and fully paid upon the facts in the premises following to wit:

That the obligation of these plaintiffs to repay such sum as said trustee may have paid said Keyser was an obligation ever upon the condition that such expenditure should be made by said trustee to perform, and the better to perform, the trust created in and by said contract of said trustee with these plaintiffs dated October 11, 1909, a copy of which contract, marked Exhibit A, is filed with the complaint herein; that in and by said contract it was the duty of said trustee to furnish upon the written order of said Dora E. Rooker moneys with which to perform and the better to perform the trust created in and by said contract, and which trust was one calling for fidelity on the part of said trustee in aiding and assisting said Dora E. Rooker to erect and construct the dwelling house and outbuildings appurtenant thereto and other necessary and
286 proper structures, and to equip the same with modern utilities and conveniences in the completion and installation thereof; that said Dora E. Rooker had theretofore duly entered into a contract in writing with said George W. Keyser to furnish all labor, material and fixtures for the plumbing work and the water and sewage system of her said dwelling house all at an agreed price of

nine hundred and eighty eight dollars; for which said Dora E. Rooker agreed to pay said Keyser in installments; that after said Keyser had purchased his unfitted and unmade material, and a part thereof had been delivered on the premises of the said Dora E. Rooker for use in the premises, and after said Keyser had done a small amount of the work of laying pipe and making fittings it became and was the duty of said Dora E. Rooker to issue to said Keyser her written order upon said trustee in the sum of Four hundred Dollars ($400.00) and in part performance of her said contract with said Keyser; that said Dora E. Rooker in good faith executed her said order to said Keyser and said Keyser in good faith accepted said order; that said trustee wrongfully in disregard of its duties and in violation of the rights of the said Dora E. Rooker, refused to pay said order or any part thereof, but compelled the said Keyser to employ attorneys at a great expense to enforce the collection of such order; that said Keyser did employ such attorneys to enforce the collection of such order; that thereupon said trustee wrongfully coerced forced, required and prevailed upon and induced said Keyser to abandon his said contract with the said Dora E. Rooker to furnish all labor, material and fixtures for the plumbing work and the water and sewage system of her said dwelling house and said trus-
287 tee further wrongfully in disregard of its duties and in violation of the rights of said Dora E. Rooker, in the premises prevailed upon and induced, coerced, forced and required said Keyser to file a notice of his intention to hold a mechanic's lien against the said premises of said Dora E. Rooker for said work and labor done and material furnished, and said Keyser did file such notice of his intention to hold a lien, in the office of the Recorder of said Hamilton County, Indiana; that said Trust Company thereupon with the knowledge and consent of said trustee wrongfully prevailed upon said Keyser to assign said pretended lien and said builder's contract to said Trust Company in its corporate capacity proper, and thereupon said Keyser and said Trust Company wholly and finally abandoned said contract and the performance thereof, and that by reason of the premises said dwelling house instead of being equipped with modern conveniences and utilities completed and installed, contains only a few disconnected and broken-up articles of plumber's materials and supplies, and the same are wholly useless to said dwelling house and are of no value therein; that soon thereafter the said Keyser departed this life; that the said price at which said Keyser had undertaken and agreed to do said work and labor and furnish said materials as in his said written contract set forth and provided was highly advantageous to said Dora E. Rooker, and to said trust estate; that the reasonable worth and value of the said work and labor which said Keyser had so agreed to do and of the said materials which he had so agreed to furnish was and is two thousand dollars which said sum is wholly
288 lost to said Dora E. Rooker and to said trust estate by reason of the said wrongful and unlawful conduct of the defendants; that by reason of the said wrongful acts of said Trust Company, the said Dora E. Rooker was obstructed in her right and prevented by

said Trust Company from enforcing her said contract against said Keyser and said plumbing work became and is incompleted, disconnected and useless, all to the damage of said Dora E. Rooker Fifteen Hundred Dollars ($1,500.00).

Wherefore plaintiffs demand judgment as in the amended complaint prayed and they ask that said item of four hundred dollars ($400.00) be wholly disregarded and that for said item and on this paragraph they be allowed judgment *over for* fifteen Hundred Dollars and they ask for all proper relief.

9. Dora E. Rooker and William V. Rooker, plaintiffs, for their separate and several partial defenses to so much of the second amended Counter Claim as is made by the defendant in its capacity as trustee and as ninth paragraph of plaintiffs' several separate and partial replies thereto respectively say: that as to so much of said second amended counter claim as seeks to recover the principal sum of One Hundred and Eighty-four Dollars and 50 100 ($184.50) designated in said cross complaint as Voucher 32 April 12, 1910 Lacy Seed and Hay Company upon the written order of Dora E. Rooker for seed purchased to be used on the farm of said Dora E. Rooker, these plaintiffs say that said claim should be disallowed for the reason that the obligation of these plaintiffs and the
289 obligation of said trust estate to repay such sum as said Trust Company might and should pay out on said order of said Dora E. Rooker was an obligation ever upon the condition that said expenditure should be made by said trustee to perform, and the better to perform the trust created in and by said contract by said trustee with these plaintiffs dated October 11, 1909, a copy of which contract marked "Exhibit A" is filed with the amended complaint herein; that said contract for the performance of said trust was a contract calling for fidelity and diligence on the part of said trustee in aiding and assisting the said Dora E. Rooker to meet her obligations and to accomplish the true and better and complete performance of said trust agreement, and to the successful maintenance of and care for said real estate and the business thereon conducted; that said voucher was given in payment for seed oats; that in March prior to the issuance of said voucher these plaintiffs duly notified said Trust Company of their purpose and of the advisability of seeding to oats twenty acres of said trust lands situate in Marion County and forty acres of said trust lands situated in Hamilton County and that these plaintiffs had neither the seed oats nor the available moneys with which to purchase such seed oats; that thereupon said trustee consented and agreed to honor and pay a voucher for said seed oats duly upon presentation; that thereupon these plaintiffs at a cost and expense of to-wit Two Hundred Dollars ($200.00) caused and procured said sixty acres of said land to be broken and prepared for seeding to oats; that said work
290 was well and seasonably done; that thereupon said Dora E. Rooker presented her said voucher to said trustee for the amount required to purchase said seed oats; that said trustee failed and refused to honor and pay said voucher for a long time, to-wit,

one month; that because of such delay the proper time for seasonably seeding such oats under ordinary conditions passed; that plaintiffs desiring to save themselves the loss that would ensue from the abandonment of said fields so prepared for oats, sowed the same relying upon the reasonable chance that favorable weather conditions might prove propitious for the growth of said crop that said oats grew and matured into a sub-normal but reasonably fair crop of, towit; thirty bushels per acre; that upon the maturity of said crop said trustee in violation of the rights of these plaintiffs and in wrongful disregard of its said duties failed and refused to provide any means whatever for the harvesting of said crop; that by reason of said trustees said wrongful acts, said crop remained unharvested and was wholly wasted and lost, and plaintiffs were required to and did sustain and suffer loss of time, labor and expense in preparing said land for said oats crop, and they in like manner and for the same reasons sustained and suffered the loss of said land for the season, all to their damage in the sum of One Thousand Five Hundred ($1,500.00) Dollars.

Wherefore, plaintiffs demand judgment as in the amended complaint prayed, and they ask that said item of One Hundred and Eighty-four and 50/100 Dollars ($184.50) be wholly disallowed as a claim against said trust estate, and that judgment ever be
291 awarded on this paragraph in the sum of one thousand three hundred dollars ($1,300.00) and they pray for all proper relief.

10. Dora E. Rooker, and William V. Rooker, plaintiffs, for their separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as tenth paragraph of plaintiffs several, separate and partial replies thereto, respectively say; that as to so much of said counter claim as seeks to recover the principal sum of Five Hundred and Five Dollars specified in said counter claim as Voucher No. 43, dated August 26, 1910, payable to the Illinois Surety Company, and as to so much of said counter claim as seeks to recover the principal sum of four hundred and forty-two dollars and forty-two cents, specified in said counter claim as voucher No. 78 dated June 25, 1912, payable to Will F. Wall, Clerk, and to so much of said counter claim as seeks to recover the principal sum of twenty-eight dollars and seventy cents specified in said counter claim as Voucher No. 79, dated June 25, 1913, payable to J. Fred France, Clerk, plaintiffs say that said items should be disallowed in the form and manner as presented in said counter claim and that said items should be made the subject of an accounting by the court and that said item of five hundred and five dollars specified in said Voucher No. 43 to Illinois Surety Company should be wholly disallowed; that said three items are one and the same transaction and represent one and the same liability varying only in point of time and as to the facts in the premises occurred which were as follows, to-wit; On
292 the 27th day of January, 1910, in and by the judgment of this court in Cause No. 15246 the Ludowici-Celadon Company recovered against these plaintiff- the principal sum of three

hundred and forty-seven dollars and forty one cents, with costs taxed at — dollars and for the foreclosure of a mechanic's lien on lands embraced within this trust and situate in said Hamilton County; that these plaintiffs desiring to appeal from said judgment procured the said Illinois Surety Company to become surety on their appeal bond in the manner following to-wit: Said defendant Trust Company in consideration of its interest in the premises and in consideration of its use of the money at low rate of interest during the time engaged, but being by law disqualified from entering into contracts of indemnity undertook to honor the order of the said Dora E. Rooker for the principal sum of Five Hundred and Five dollars ($505.00) ever, however, upon the said condition that said Surety Company should not cash such order nor withdraw the funds thereby represented, from the said Trust Company, but on the contrary, said Surety Company should deposit said order with said Trust Company and should take a certificate of deposit in lieu of such order, and that such Surety Company should not cash such certificate but should permit the same to be and remain on deposit with said Trust Company, and to bear interest at the rate of four per cent per annum credited semi-annually to the use and benefit of said trust estate until the proceeds thereof were required to pay said judgment and costs on affirmance and to liquidate and pay the costs, expenses, premiums and other proper charges which said Trust Company was to pay on account of said judgment, interest and costs on the
293 affirmance thereof and to account to the said Dora E. Rooker and trust estate for the residue of said deposit with interest thereon at four per cent and said surety company was thereupon to release its interest therein; that said Surety Company thereupon in performance of said agreement accepted the said written order of Dora E. Rooker and deposited the same wtih said Trust Company and took a certificate of deposit for Five Hundred dollars ($500.00), being the full amount of said order less Five Dollars ($5.00) for the annual premium payable to said Surety Company; that said deposit remained in said Trust Company until on, to-wit, the 25th day of June 1913; that said judgment was affirmed on, to-wit the — day of — —, 1913; that thereafter said Trust Company paid said judgment and costs, but as to the residue of said deposit, in the principal sum of twenty-eight dollars and eighty cents with interest in the sum of fifty-six dollars and fifty cents and all in the aggregate eighty-five dollars and thirty eight cents ($85.38); said Trust Company and said Surety Company each endeavored to convert and appropriate to its own use, and each failed and refused to account to these plaintiffs, or to either of them or to said trust estate, for the said residue; that thereafter said Trust Company and said Surety Company became involved in litigation over said residue and to such litigation these plaintiffs were made parties defendant; that said litigation was in the Superior Court of Marion County, Indiana, as cause No. 91,178, entitled Fidelity Trust Company vs. Illinois Surety Company, et al.; that in said action said Surety Company by its cross complaint sought to recover against these plaintiffs a
294 large sum, to-wit, One Hundred Dollars ($100.00) for its premiums and its attorneys' fees in said action; that plaintiffs

were required to lay out and expend a large sum, to-wit; One Hundred Dollars ($100.00) for attorneys' fees and expenses in and about their defense of said suit; that said expense was reasonable and was necessarily incurred by these plaintiffs; that the same was due wholly to the said default of said Trust Company; that said Trust Company is and should be held to be liable therefor; and that an accounting should be made and taken as to the said fund and that these plaintiffs should have judgment accordingly.

Wherefore, plaintiffs demand judgment as in the complaint prayed and they ask that an accounting be had and taken as to said items; that the damage of these plaintiffs should be ascertained and assessed against said Trust Company and these plaintiffs pray for all proper relief.

11. Dora E. Rooker and William V. Rooker plaintiffs for their separate and several partial defense to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as eleventh paragraph of plaintiffs' several, separate and partial replies thereto, respectively say: That as to so much of said counter-claim as seeks to recover the principal sum of five hundred and seventy one dollars ($571.21) and twenty-one cents, specified in said second amended counter claim and the exhibits filed therewith as a payment made to Balke-Krauss Company, voucher 53, March 7, 1913, for assignment of judgment and lien in foreclosure against Dora E. Rooker in the Hamilton Circuit Court and also to so much of said cross complaint as seeks to recover
295 the principal sum of fifty dollars ($50.00) specified in said second amended counter claim and in the exhibits filed therewith as a payment made to Kane and Kane for legal services, Voucher 83 November 26, 1912, and also to so much of said counter-claim as seeks to recover the principal sum of one hundred dollars specified in said counter claim as a payment to Henry Seyfried for legal services Voucher 84, March 19, 1913, these plaintiffs say that said items are all one and part of the same transaction and should be disallowed in the form and manner as presented in said counter claim and that said items taken together should be made the subject of an accounting by the court and that said attorneys' fees should be disallowed wholly and that said payment to Balke-Krause Company should be reduced to the principal sum of four hundred and eighty-three dollars ($483.00) as against which these plaintiffs should be allowed an additional and further set off in the sum of one hundred and fifty dollars ($150.00) upon the facts following, to wit: that the obligation of these plaintiffs and the obligation of said trust estate to repay such sum as said trustee might and should lay out and expend with respect to said trust estate was not an obligation ever upon the condition that such expenditures should be made by said Trust Company to perform and the better to perform the said trust created in and by said contract, which said trust was one calling for diligence and fidelity on the part of said Trust Company all as more fully appears in said trust agreement, a copy of which, marked "Exhibit A" is filed with the amended

complaint herein; that in and about the erection and con-
296 struction of her said dwelling house, the said Dora E. Rooker became indebted to said Balke and Krause Company in the sum of to wit, Four Hundred and Eighty Three Dollars ($483.00); that on, to wit, the — day of ——, 1912, the said Dora E. Rooker executed to said Balke and Krauss Company her written order on said Trust Company to pay to said Balke and Krauss Company on demand said sum of Four Hundred and eighty-three dollars ($483.00); that said trustee without right dishonored said order and refused to pay the same but wrongfully disregarding its own duties in the premises said trustee and said Trust Company caused and procured said Balke and Krauss Company to encumber said real estate with a notice of intention to hold a mechanic's lien on said premises and notwithstanding said trustee and said Trust Company well knew there was no defense whatever to said demand of said Balke and Krauss Company, said trustee and said Company caused and procured said Balke and Krauss Company to institute and prosecute to judgment an action to foreclose said lien; that said trustee and said Trust Company caused and procured said Balke and Krauss Company to make the said Dora E. Rooker a party to said suit; that her attorneys' fees and expenses in and about the defense of said action were reasonably worth One Hundred and Fifty Dollars ($150.00); that on the trial of said cause attorneys' fees as provided by statute were added in favor of said Balke and Krauss Company by the court of, to wit, Seventy-five dollars ($75.00); that said Trust Company employed said Kane and Kane and said Seyfried to de-
297 fend said action, but their services were wholly fruitless and worthless, but nevertheless said Trust Company paid to said Kane and Kane said item of Fifty Dollars ($50.00) represented in and by said voucher 83 and paid to said Seyfried said item of One Hundred ($100.00) dollars represented in and by said voucher 84, and said items 83 and 84 were paid for no other services; that thereafter said trustee and said Trust Company in further wrongful disregard of said trustee's duties in the premises and in violation of the rights of these plaintiffs and seeking to speculate against the estate of said Trust and seeking how said Trust Company might by sale on execution and decree on said judgment circumvent the clause of sale in said trust agreement marked "Exhibit," caused and procured said Balke and Krauss Company to execute its assignment of said judgment and lien to said Trust Company while said Balke and Krauss Company continued to hold the said Dora E. Rooker's said order for the payment of said money; that it never was any part of the obligation of these plaintiffs or of either of them or of said trust estate to pay out of said trust estate or under said trust agreement any such claims or demands as said Trust Company might acquire either by purchase adversely to said trust estate of for the purpose of its own speculation.

Wherefore, these plaintiffs demand judgment as in the amended complaint prayed that said items specified by said vouchers 53, 83 and 84 be wholly disallowed and subject to an accounting and that plaintiffs be awarded judgment and they pray for all proper relief.

298 12. Dora E. Rooker and William V. Rooker, plaintiffs for their separate and several partial defenses to so much of the second amended Counter claim as is made by the defendant in its capacity as trustee and as twelfth paragraph of plaintiffs' several, separate and partial replies thereto, respectively say: That as to so much of said counter claim as seeks to recover the principal sum of Forty dollars and sixty four cents, the same being composed of the following items to wit:

Voucher.	Date.	Subject.	Amount.
85.	June 14 '12.	Seyfried Expense	$2.50
86.	Oct. 4 '10.	Abstract. Contd.	1.50
87.	Dec. 28 '10.	" "	2.50
88.	Dec. 20 '11.	" "	2.50
89.	June 22 '12.	" "	2.00
90.	April 15 '13.	" "	6.00
91.	Dec. 8 '13.	" "	3.50
92.	Mar. 19 '13.	" "	2.50
93.	June 10 '10.	Telephone	1.50
94.	July 14 '10.	"	.40
95.	Nov. 19 '10.	"	.15
96.	June 23 '11.	"	.15
97.	May 17 '11.	Automobile	5.00
98.	May 29 '11.	"	5.00
99.	June 17 '11.	Advertising	1.90
100.	Aug 14 '11	"	.54
	Total		$40.64

299 These plaintiffs say that said items should be disallowed wholly for the reason that as to these plaintiffs and to said trust estate said items were wholly without consideration and for the further reason that the obligation of these plaintiffs to repay and the obligation of said trust estate to repay such sums as said trustee might and should lay out and expend was ever upon the conditions that such expenditures should be limited strictly to such as should be made to perform and the better to perform a certain contract of trust evidenced by a memorandum in writing executed by these plaintiffs and said trustee on October 14, 1909, a copy of which memorandum marked "Exhibit A" is filed with the complaint herein; that said trust contract was one calling for competency and fidelity on the part of the said Trust Company; that the said items are not nor is either of them a charge or lien against said land or an item that arises out of the preservation of said trust estate or that arises out of the carrying on of the business conducted of said trust estate on said lands; that said items of expenditures laid out and incurred, if at all laid out and incurred were laid out and incurred by said Trust Company in the conduct of its own affairs and in the promotion of its own interests and in the accomplishment of its own purposes, and for which as to said trustee's compensation was made contractual by said trust agreement.

Wherefore these plaintiffs demand judgment as in the amended complaint prayed and that said items be disallowed and they pray for all proper relief.

13. Dora E. Rooker and William V. Rooker plaintiffs for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as thirteenth paragraph of plaintiffs' several, separate and partial replies thereto, respectively say: That as to so much of said Counter Claim as seeks to recover as for in-
360 surance premiums paid, the principal sum of one hundred and thirty six dollars and fifty cents the same being composed of the following items to-wit:

Voucher.	Date.	Subject.	Amount.
80.	Oct. 17, '14.	Fidelity *et al.* Co.	$95.00
81.	April 28, '16.	" " "	40.50
	Total		136.50

Plaintiffs say that said items should be wholly disallowed for the reason that the obligation of these plaintiffs and of said trust estate to repay any moneys said trustee might and should lay out and expend was ever and solely for *for* the con-ideration and upon the conditions stated in said trust agreement a copy of which marked Exhibit A is filed with the Amended complaint herein: that in and by said agreement said trustee obligated itself to strict fidelity to these plaintiffs and to said trust estate, all to the end that the interests and welfare of said trust estate should thereby be the better conserved and the said trust the more prudently managed and its affairs the more efficiently and advantageously administered; that the said obligation of said trustee and the faithful performance of such obligation were the consideration of said trust agreement and among the conditions precedent to the duty of these plaintiffs and of said trust estate to repay any moneys which said trustee might and should lay out and expend by virtue of its office as such trustee; but, plaintiffs say, the said moneys mentioned in this paragraph of reply were not laid out and expended by said trustee in the performance of its said duties to said trust estate and to these plaintiffs as beneficiaries of said trust
estate, but on the contrary said trustee, in wrongful disregard
301 of its said duties in the premises and in unlawful violation of the rights of these plaintiffs and of said trust estate in the premises, did on, to-wit, the 28th day of October, 1912, wrongfully and unlawfully enter into a scheme and collusion with said Fidelity Trust Company in its corporate capacity proper to the purpose and intent that said Trust Company in its co-porate capacity proper, should acquire as its own gain, advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that in and about the carrying out and accomplishing of said scheme and collusion said trustee agreed to and with said Fidelity Trust Company in its co-porate capacity proper, that

said trustee should abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the premises arising out of said trust agreement and, accordingly, said trustee did abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the said affected premises and thereupon said trustee joined with said Fidelity Trust Company in its co-porate capacity proper in serving a written notice upon these plaintiffs of such disaffirmance, abandonment and repudiation of said trust agreement and of the duties and obligations of said trustee thereunder; that a copy of said written notice of disaffirmance, abandonment and repudiation marked "Exhibit A" is filed with the amended complaint herein; that thereafter in further carrying out said unlawful scheme and collusion said Fidelity Trust Company in its co-porate capacity proper, brought its action
302 as a cross complaint against these plaintiffs in this suit and caused and thereupon procured said trust agreement to be foreclosed as a mortgage against said trust estate and upon decretal sale caused and procured said trust estate to be sold as other lands are sold on execution and under and by virtue of such decretal sale caused and acquired the title of in and to said trust estate to be acquired by and vested in said Fidelity Trust Company in its co-porate capacity proper; that the said acquisition of said title of and to said trust estate was an unlawful appropriation and conversion of said trust estate and the property and value thereof by said Fidelity Trust Company in its co-porate capacity proper; that while said title to said property of said trust estate was so unlawfully held by said Trust Company in its co-porate capacity proper, the said insurance was effected which is designated in said vouchers, Nos. 80 and 81; that said insurance premiums so paid if paid at all, were paid by said Fidelity Trust Company, in its co-porate capacity proper were voluntary payments on its own part and were in the aid and advancement of said Trust Company's own wrong in the wrongful and unlawful carrying out of said scheme and collusion and were not at the time they were made, if they ever were made nor are they now an obligation and liability of nor charge against said trust estate and said items should be disallowed wholly in this action.

Wherefore plaintiffs demand judgment as in their complaint prayed and on this their thirteenth paragraph of replies they ask that the said items herein described be disallowed wholly.

303 14. Dora E. Rooker and William V. Rooker, plaintiffs for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as fourteenth paragraph of plaintiffs' several, separate and partial replies thereto respectively say: That as to so much of said Counter Claim as seeks to recover the principal sum of fourteen thousand four hundred and twenty four dollars and fifty cents, purporting to have been paid to the American Central Life Insurance Company as and for the principal and accrued interest of a certain described mortgage, and designated in said Counter Claim as a payment made on November 21, 1913, voucher exhibit No. 82, which said mortgage purports to be set forth at large as "Ex-

hibit A" in said Counter Claim, plaintiffs say that said item should be wholly disallowed for the reason that the obligation of these plaintiffs and of said trust estate to repay any moneys said trustee might and should lay out and expend was ever and solely for the consideration and upon the conditions stated in said trust agreement a copy of which marked "Exhibit A" is filed with the Amended Complaint herein; that in and by said trust agreement said trustee obligated itself to strict fidelity to these plaintiffs and to said trust estate, all to the end that the interests and welfare of said trust estate should thereby be the better conserved and the said trust the more prudently managed and its affairs the more efficiently and advantageously administered; that the said obligations of said trustee and the faithful performance of such obligations were the consideration of said
304 trust agreement and among the conditions precedent to the duty of these plaintiffs and of said trust estate to repay any moneys which said trustee might and should lay out and expend by virtue of its office as such trustee; and in and about performing its duties to said trust estate and to these plaintiffs and other beneficiaries of said trust; but, plaintiffs say, the said moneys mentioned in this paragraph of reply were not laid out and expended by said trustee in the performance of its duties to said trust estate and to these plaintiffs and others as beneficiaries of said trust estate but on the contrary said trustee, in wrongful disregard of its duties in the premises to said trust estate and in unlawful violation of the rights of these plaintiffs and of said trust estate in the premises, did, on to-wit the 28th day of October 1912 wrongfully and unlawfully enter into a scheme and collusion with said Fidelity Trust Company in its co-porate capacity proper to the purpose and intent that said Trust Company in its co-porate capacity proper should to itself sequester and acquire as its own gain advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that in and about the carrying out and accomplishing of said scheme and collusion said trustee agreed to and with said Fidelity Trust Company in its co-porate capacity proper, that said Trustee should abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the premises arising out of said trust agreement and, accordingly, said trustee did
305 abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the said affected premises and thereupon said trustee joined with said Fidelity Trust Company in its co-porate capacity proper in serving a written notice on these plaintiffs of such disaffirmance, abandonment and repudiation of said trust agreement and of the duties and obligations of said trustee thereunder; that a copy of said written notice of disaffirmance, abandonment and repudiation, marked "Exhibit 1," is filed with the complaint herein; that thereupon said Trust Company in its co-porate capacity proper unlawfully and wrongfully set about to sequester and acquire to itself and did accordingly acquire to itself as its own gain, advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of

these plaintiffs and of all other just, lawful and proper beneficiaries; that in and about the said carrying out and accomplishing of said scheme and collusion and in and about the said unlawful and wrongful appropriation and conversion by said Trust Company in its co-porate capacity proper of the said entire property and value of said trust estate said Trust Company in its co-porate capacity proper, purchased or otherwise acquired each and every such right, title and interest as it now may have or at any time heretofore may have had in and to said so called American Central Life Insurance Company mortgage and to any part thereof; that any sum, which may have been paid, or agreed to be paid, by said Trust Company, if paid at all, was paid by said Trust Company in its co-porate capacity proper, and was a voluntary payment on its part and was in aid and
306 advancement of said Trust Company's own wrong in the wrongful and unlawful carrying out of said scheme and collusion and was not at the time it was made, if it ever was made, an obligation and liability of nor charge against said trust estate; that said pretended mortgage was long past due and the validity thereof was then and there the subject of pending litigation between the said Dora E. Rooker and said American Central Life Insurance Company long prior to and at the time said Trust Company acquired, if it did acquire, any interest therein; that of all the facts in the premises affecting said pretended mortgage said Fidelity Trust Company in its co-porate capacity proper had due and timely notice and by reason thereof it took and acquired any and every such interest as it may have taken and acquired in said mortgage and said mortgage debt by written assignment from said American Central Life Insurance Company without recourse on it, the said assignor; that said items set forth in said counter claim as and for the acquisition payment, extinction or whatsoever it may be, of said so called American Central Life Insurance Company mortgage are wrongful and unlawful charges herein and should be disallowed wholly.

Wherefore plaintiffs demand judgment as in their amended complaint prayed and on this their fourteenth paragraph of replies they ask that said items herein described be disallowed wholly.

15. Dora E. Rooker and William V. Rooker, plaintiffs, for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as fifteenth paragraph of plaintiffs' several,
307 *sea*prate and partial replies thereto, respectively say: That as to so much of said counter claim as seeks to recover on each and every of the certain items severally of purported payment made subsequent to the 28th day of October, 1912, the same being severally more particularly designated by the following described exhibits, to-wit:

No.	Date.	Payee.	Amount.
53.	Mar. 17, '13.	Balke Krauss Co.	$571.21
56.	Nov. 3, '13.	Indianapolis Life *ect.*	622.08
57.	July 31, '13.	Am. Central Life *ect.* Co.	426.72
64.	May 5, '13.	Carl Von Hake	42.86
65.	Feb. 10, '14.	Carl Von Hake	123.73
66.	Feb. 14, '16.	Ed. G. Sourbier	99.90
67.	Oct. 14, '16.	Ed. G. Sourbier	43.75
68.	Oct. 14, '16.	Ed. G. Sourbier	18.45
69.	Nov. 13, '16.	Ed. H. Sourbier	44.25
70.	Nov. 13, '16.	Ed. G. Sourbier	18.45
74.	Nov. 8, '12.	John E. Best	444.34
75.	May 3, '13.	John E. Best	136.29
76.	July 5, '16.	L. G. Heiny	855.10
77.	Oct. 14, '16.	L. G. Heiny	319.15
80.	Oct. 17, '14.	Fidelity Trust Co.	96.00
81.	April 28, '16.	Fidelity Trust Co.	40.50
82.	Nov. 22, '13.	Am. Central Life Ins.	424.50
83.	Nov. 26, '12.	Kane and Kane	50.00
84.	Mar. 19, '13.	Henry Seyfried	100.00
90.	Apr. 15, '13.	Fidelity Trust Co.	6.00
91.	Dec. 8, '13.	Fidelity Trust Co.	3.50
92.	May 19, '13.	W. M. Coval & Son	2.50

308 Plaintiffs say that each of said several items should be wholly disallowed for the reason that the obligation of these plaintiffs and of said trust estate to repay any moneys said trustee might and should lay out and expend was ever and solely for the consideration upon the conditions, stated in said trust agreement, a copy of which marked "Exhibit A" is filed with the amended complaint therein; that in and by said trust agreement said trustee obligated itself to strict fidelity to these plaintiffs and to said trust estate, all to the end that the interests and welfare of said trust estate should thereby be the better conserved and the said trust the more prudently managed and its affairs the more efficiently and advantageously administered; that the said obligations of said trustee and the faithful performance of such obligations were the consideration of said trust agreement and among the conditions precedent to the duty of these plaintiffs and of said trust estate to repay any moneys which said trustee might and should lay out and expend by virtue of its office as such trustee and in and about performing its duties to said trust estate and to these plaintiffs and other beneficiaries of said trust estate; but, plaintiffs say, the said moneys mentioned in this paragraph of reply were not laid out and expended by said trustee in the performance of its duties to said trust estate and to these plaintiffs and others as beneficiaries of said trust estate but on contrary said trustee, in wrongful disregard of its said duties in the premises to said trust estate and in unlawful violation of the right

of these plaintiffs and of said trust estate in the premises did,
309 on to wit the 28th day of October 1912, wrongfully and unlawfully enter into a scheme and collusion with said Fidelity Trust Company in its co-porate capacity proper to the purpose and intent the said Trust Company in its co-porate capacity proper should to itself sequester and acquire as its own gain, advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that in and about the carrying out and accomplishing of said scheme and collusion said trustee agreed to and with said Fidelity Trust Company in its co-porate capacity proper, that said trustee should abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the premises arising out of said trust agreement, and, accordingly, said trustee did abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the affected premises and thereupon said trustee joined with said Fidelity Trust Company in its co-porate capacity proper in serving a written notice on these plaintiffs of such disaffirmance, abandonment and repudiation of said trust agreement and of the duties and obligation of said trustee thereunder; that a copy of said written notice of disaffirmance, abandonment and repudiation, marked "Exhibit 1," is filed with the complaint herein; that thereupon said Trust Company in its co-porate capacity proper wrongfully and unlawfully set about to sequester and acquire to itself and did accordingly acquire to itself
310 as its own gain advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that while said Fidelity Trust Company in its co-porate capacity proper, was engaged in carrying out and accomplishing its said scheme and collusion and while it was engaged in and about sequestering and acquiring to itself as it did acquire to itself as its own gain, advantage, profit and riches the entire value and property of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries, the said Trust Company in its said co-porate capacity proper laid out and expended each and every one of the sums of money, if in fact it laid out and expended any whatsoever, stated as to each and every of the said items mentioned in this paragraph of reply; that each and every of said sums of money so laid out and expended, if any, was laid out and expended by said Trust Company in its co-porate capacity proper in aid and furtherance of its own wrong and said several items are not nor is either of them an item which arises out of the performance of said office of trustee in the premises and each and every of said items should be disallowed wholly in this suit.

Wherefore plaintiffs demand judgment as in their complaint prayed and they ask that each of the said items described in this paragraph of replies be wholly disallowed.

W. V. ROOKER,
Attorneys for Plaintiffs.

311 "The defendant Fidelity Trust Company files answer of general denial to each paragraph of partial reply of plaintiffs, which answers read as follows: (H. I.)"

"And the defendant Trust Company as trustee, filed answer in general denial to each paragraph of partial reply of plaintiff which answers read as follows:" (H. I.)

And plaintiffs are now ruled to answer supplemental counterclaim on before June 1st, 1918.

And afterwards to-wit on the 5th day of June 1918, the same being the 57th Judicial Day of the April term 1918, of said court, the following further proceedings were had in said cause to-wit:

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY et al.

Demurrers to Supplemental Second Amended Counter Claim.

Plaintiffs demur to each paragraph of the second amended counter claim as supplemented for the reason that the same does not
312 state facts sufficient to constitute a cause of action in favor of the defendants and connected with the cause of action in suit herein.

For their memorandum plaintiffs tender these points, viz:

1. The second amended counter claim as supplemented is joint as to the plaintiffs and must be good as to both or bad as to both. There is no privity of contract as between the plaintiffs and either of the defendants except the defendant as trustee; It contravenes the mandate of the Supreme Court in this cause to admit issues in this cause which are outside of those within the terms and effect the trust agreement and the notice of repudiation thereof and the suit for an accounting as between these plaintiffs and the trustee. If the trustee borrowed money from Fidelity Trust Company, or any other bank or banker, whomsoever such transaction would not, under the trust

agreement, constitute or create a privity between such bank or banker and these plaintiffs.

2. Steps taken by the Fidelity Trust Company, in its corporate capacity proper to fortify the title it sought to acquire and did acquire unlawfully were acts done in aid of its own wrong and have no place in an accounting between the cestui que trustants and the trustee.

3. The trustee and its co-plaintiff having elected to repudiate the trust agreement and having thereby caused the cestui que trustants to change their situation greatly to their loss and damage will not be *hear* to declare that such act of repudiation was void and that such an election to repudiate is to be disregarded.

313 4. The trustee having elected, with the aid and participation of its co-plaintiff to repudiate the trust and having thereupon caused the plaintiffs to suffer loss and damage and to change their situation could not in any event ask that said trust agreement be reinstated except upon a tender that equity be done these plaintiffs. There is no tender of equity made.

W. V. ROOKER,
Attorney for Plaintiffs.

Come now the parties and the demurrer to the second supplemental counter-claim is now overruled to which ruling the plaintiff excepts and the plaintiff now filed an answer to the joint counter-claim which answer reads as follows:

STATE OF INDIANA,
Hamilton County:

In the Hamilton Circuit Court, October Term, 1917.

DORA E. ROOKER et al.

v.

FIDELITY TRUST CO. et al.

Joint Answers to Joint Counter-Claim.

1. Dora E. Rooker and William V. Rooker, plaintiffs for their first defense to the joint counter claim of the Fidelity Trust Company as trustee and the Fidelity Trust Company in its co-porate capacity proper, and for first paragraph of plaintiffs' joint answer to said joint counter claim say; That they deny each and every allegation contained in the joint counter claim of the defendants herein.

Wherefore plaintiffs demand judgment as in their com-
314 plaint prayed.

2. Dora E. Rooker and William V. Rooker, plaintiffs for their further defense to the joint counter claim of the Fidelity Trust Com-

pany as trustees and the Fidelity Trust Company in its co-porate capacity proper, and for plaintiffs' second paragraph of joint answer to said joint counter claim say: That the claim sued on in said counter claim was fully paid before the bringing of this action.

Wherefore plaintiffs demand judgment as in their complaint prayed.

W. V. ROOKER,
Attorneys for Plaintiffs.

The defendants now file reply to the Counter-claim filed by the plaintiff which reply reads as follows: (not on file).

And afterward towit: On the 24th day of July, 1918, the same being the 99th Judicial day of the April Term, 1918, of said Court, the following further proceedings were had in said cause towit:

"Come now the parties and this cause is continued until July 30th, 1918."

And afterward towit: On the 30th day of July, 1918, being the 104th Judicial day of the April Term 1918, of said Court the following further proceedings were had in said cause towit:

"Come now the parties and the defendant files an answer of general denial to the second supplemental counter-claim which
315 reads as follows: (not on file).

Said defendant also files answer to partial reply to counter-claim, which answer reads as follows (Not on file). And plaintiff and defendant now both request the Court for a special finding of facts, which request is now granted, and this cause is now submitted to trial and the evidence is heard in part and this cause is continued until tomorrow morning at 9 o'clock.

Afterwards towit: On the 31st day of July, 1918, being the 105th Judicial day of the April Term, 1918 of said court the following further proceedings were had in said cause towit:

Comes now the parties and the hearing of the evidence is resumed and completed, and this cause is taken under advisement by the Court, and by agreement of the parties the Wainwright Trust Company is appointed temporary receiver to take charge of the property and rent the tillable lands for cultivation excepting the house, garden pasture field next to barn. Comes now the Wainwright Trust Company and accepts its appointment and subscribes to an oath as required by law, which oath reads as follows (H. L.).

And afterward towit: On the 21st day of December, 1918, the same being the 66th Judicial day of the October Term 1918, of said court, the following further proceedings were had in said cause, towit:

Comes now the parties, and the court now files its special findings of facts and conclusions of law, thereon which reads as follows:

316 *Special Finding of Facts.*

The plaintiff, before the commencement of trial in the above entitled cause, requested the court to make special finding of facts and state conclusions of law thereon. Now, in pursuance to such request, the Court makes and files its special finding of facts herein and state its conclusions of law thereon:

The court finds the facts to be:

First. That on and prior to the 11th day of October, 1909, the plaintiff Dora E. Rooker was the owner in fee simple of the following described real estate situate in Hamilton County, Indiana, towit:

"All the west half of the north half of section eighteen (18) township eighteen (18) north, range five east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

Also the southwest quarter of section seven, (7) township eighteen (18) north, range five east, lying west of the Lake Erie and Western Railroad, and East of White River, containing forty-eight (48) acres more or less.

Also the southeast quarter of section twelve (12) township eighteen (18) range four (4) east, containing sixty acres more or less and lying south and east of White River.

Also that part of the northeast quarter of section Thirteen (13) township Eighteen (18) north, range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty two (132) rods more or less to White River,
317 thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods, thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy five (75) acres more or less."

Second. That on and prior to the 11th day of October, 1909 the plaintiffs William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entireties, of the following described real estate situated in Marion County, Indiana, towit:

"The *The* southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north, range four (4) east containing forty (40) acres more or less. Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north, range four (4) east, containing forty (40) acres more or less."

Third. That on the said 11th day of October, 1909, said plaintiff Dora E. Rooker and William V. Rooker, her husband executed and delivered to said cross-complainant Fidelity Trust Company as trustee, their warranty deed, which is in these words and figures:

"This indenture witnesseth, that Dora E. Rooker and William V. Rooker, her husband of Hamilton County, State of Indiana, in consideration of One ($1.00) dollars, the receipt of which is hereby acknowledged, and other good and valuable considerations by them had convey and warrant, to the Fidelity Trust Company of Indianapolis, Indiana, Trustee, the following real estate in Hamilton County, State of Indiana, to-wit:

All the west half of the north half of section eighteen (18)
318 township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two acres, (92) more or less:

Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres more or less.

Also the southeast quarter of section twelve (12) township eighteen (18) north, range four (4) east, containing sixty (60) acres more or less and lying south and *each* of White River.

Also that part of the northeast quarter of section thirteen (13) township eighteen (18) north, range four (4) east, more particularly described as follows:

Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty two (132) rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres more or less.

To have and to hold said real estate however, in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company of Indianapolis, Indiana as aforesaid, to sell and convey said lands of any part of them at such prices and upon such terms as may be from time to time dictated in
319 writing by said Dora E. Rooke; to execute the proper Trustee's deed or deeds of Conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Trustee.

And said Fidelity Trust Company of Indianapolis, as such Trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey the same free and clear of any encumbrance or convey the same subject to any existing encumbrances. And to do any and all acts and to execute any and all papers, which may

be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

And in the event any such liens or charge against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforcible by it and collectible with interest at the rate of 6% per annum, to be credited semi-annually as a debit and charge against said real estate.

320 This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed to the American Central Life Insurance Company, by the grantor and William V. Rooker, her husband on November 19th, 1908, said mortgage secured the payment of a certain principal note of said grantor in the sum of Fourteen Thousand ($14,000.00) Dollars together with interest thereon and recorded in mortgage record 52, page 84 in the office of the recorder of Hamilton County, Indiana.

In witness whereof said Dora E. Rooker and William V. Rooker, her husband, have hereunto set their hands and seals this 11th day of October, 1909.

(Signed) DORA E. ROOKER.
WILLIAM V. ROOKER.

STATE OF INDIANA,
Marion County, ss:

Before me the undersigned, a Notary Public, personally appeared William V. Rooker and Dora E. Rooker, his wife, and acknowledged the execution of this deed.

Witness my hand and notarial seal this 11th day of October, 1909.

WM. J. McCOY. [SEAL.]
Notary Public.

My com. expires 7/23/1910.

That said Indenture by Dora E. Rooker and William V. Rooker her husband was received for record on the 11th day of October, 1909 and recorded in record 97 at page 117 in the Recorder's office of Hamilton County, Indiana.

Fourth. That on said 11th day of October, 1909 the plaintiff William V. Rooker and Dora E. Rooker, husband and wife executed and delivered to said cross-complainant Fidelity Trust Company as trustee, their warranty deed which is in these words and figures:

"This indenture witnesseth, That William V. Rooker and
321 Dora E. Rooker, husband and wife of Hamilton County, State of Indiana, in consideration of one ($1.00) dollar the receipt of which is hereby acknowledged and other good and valuable consideration by them had, convey and warrant to the Fidelity Trust Company of Indianapolis, Indiana, Trustee, the fol-

lowing real estate in Marion County, Indiana, to-wit: The southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east containing forty (40) acres more or less. To have and to hold said real estate, how-ver in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee, as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days' notice in writing, to be given to the grantors by the trustee herein, the Trustee may publicly advertise said real estate and sell same at public or private sale at such price as may be made by said Fidelity Trust Company of Indianapolis, as such trustee to execute the proper Trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and aby such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, by said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, Trustee, on this date.

The said Fidelity Trust Company of Indianapolis as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforcible in its hands, together with interest thereon at the rate of 6% per annum, to be credited semi-annually, to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed March 12, 1909 by the grantors William V. Rooker and Dora E. Rooker, husband and wife, to Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of six thousand ($6,000.00) dollars and interest coupon notes thereon, which mortgage is recorded in mortgage record 523, page 128 in the office of the Recorder of Marion County, State of Indiana.

In witness whereof said William V. Rooker and Dora E. Rooker have hereunto set their hands and seals this 11th day of October, 1909.

(Signed) WILLIAM V. ROOKER.
DORA E. ROOKER.

STATE OF INDIANA,
Marion County, ss:

Before me the undersigned, a notary public in and for said county and State, personally appeared William V. Rooker and Dora E. Rooker, husband and wife and acknowledged the execution of this deed.

Witness my hand and Notarial seal this 11th day of October, 1909.

WM. J. McCOY. [SEAL.]
Notary Public.

My Com. expires July 23, 1910

That this indenture was received for record on the 14th day of October, 1909 and recorded in Record 52, page 101 in the office of the Recorder of Marion County, Indiana.

Fifth. That contemporaneously with the execution of the two warranty deeds executed on the 11th day of October, 1909 to said Fidelity Trust Company, Trustee, and as part of the same
324 transaction, the plaintiffs Dora E. Rooker and William V. Rooker, as first parties and the defendant and cross-complainant Fidelity Trust Company of Indianapolis, Indiana, as second party, executed in duplication on the 11th day of October, 1909 a memorandum or contract in writing which is in these words and figures:

"This memorandum executed in duplicate at the city of Indianapolis, Indiana, this 11th day of October, 1909, by and between Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, Indiana, first parties and the Fidelity Trust Company of Indianapolis, Indiana second party, witnesseth:

Paragraph 1. That concurrently herewith and as a part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed conveyed to second party as trustee over upon the conditions and trust and upon the powers and for the uses and pur-

poses herein more particularly set forth the following real estate in Marion County, Indiana, to-wit:

The southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north, range four (4) east containing forty (40) acres more or less; also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north, range four (4) east containing forty (40) acres, more or less: Also the following real estate in Hamilton County in the State of Indiana, to-wit:

All the west half of the north half of *of* section eighteen (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less; also the southwest quarter of section seven
325 (7) township eighteen (18) north, range five (5) east lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres more or less. Also the southeast quarter of section twelve (12) township eighteen (18) north, range four (4) east and containing sixty (60) acres more or less and lying south and east of White River. Also that part of the northeast quarter of section thirteen (13) township eighteen (18) north, range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with the said section line one hundred and thirty-two (132) rods more or less to White River, thence southerly along with said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres more or less. That reference is hereby made to the said warranty deeds and to the several descriptions therein for greater certainty.

Paragraph 2. That said warranty deeds made ever upon the conditions and trust and upon the powers and for the uses and purposes herein particularly set forth that is to say: Whereas the said Dora E. Rooker, the grantor in said deed and first party herein is the owner in her own and separate right and estate of the said above described lands situate in said Hamilton County and the said Dora
E. Rooker and William V. Rooker her husband, grantors
326 in said deed and parties of the first part are the owners as tenants by the entireties of said real estate situate in said Marion County; and

Whereas the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, has heretofore undertaken to erect and construct a dwelling house and out buildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences and in so doing has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay, and

Whereas, the said improvements have been carried so far toward completion as that they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and as to the said Dora E. Rooker and without great injury to her estate, and

Whereas it required six thousand ($6,000.00) dollars to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her arising out of the making of said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of the making of said improvements.

Now therefor- it is agreed that the said Fidelity Trust Company second party herein shall and it does hereby accept the title of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say.

Clause A. The Fidelity Trust Company shall pay and it
327 does hereby agree to pay from time to time upon the written order and directions of said Dora E. Rooker not exceeding the sum of Six Thousand ($6,000.00) dollars for and on account of the erection and construction of said dwelling house, out buildings and improvements and the equipment and installation thereof, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made by said Dora E. Rooker, or to the said William V. Rooker as the undisclosed principal of said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit notwithstanding the form of said indebtedness shall be forever biding and conclusive on all parties concerned that such debt or debts so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

Clause B. The said Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said Trust Compay may deem necessary to protect its interest in and to said real estate and to perform or better promote the performance of the trust herein and hereby created and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her express written direction.

Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the
328 promissory note or notes of the said Dora E. Rooker any such sum or sums of money whether within or in the excess of the sum of Six Thousand ($6,000.00) dollars as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

Clause D. Said Fidelity Trust Company is hereby appointed, empowered and authorized as the true and lawful attorney in fact of the first parties and in their separate deed joint name, place right and stead to execute a deed of general warranty or deeds of general warranty conveying said real estate or any part or parts thereof upon the limitations hereinafter stated and provided.

Paragraph 3. Said Fidelity Trust Company shall have and receive for its compensation Trustee's fees of One Hundred and Fifty ($150.00) dollars and a commission of two per cent on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote and true and better performance of this trust, together with the interest in all such moneys at the rate of six per cent per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against said Dora E. Rooker and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company pursuant to this agreement and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one eighth (1/8)
329 of one (1) per cent of all notes for ninety (90) days or less for moneys obtained from any bank to the credit of said Dora E. Rooker on her paper originally made.

Paragraph 4. It is further ever understood and agreed that at any time within one year after the date of these presents said second party may execute and perform so much of the power to sell and convey as is hereinbefore granted as pertains to said Marion County real estate provided always that the sum received in consideration therefor shall be net to the credit of said Dora E. Rooker eighteen Thousand ($18,000.00) dollars after the payment of the commission hereinbefore mentioned should it so happen that said Marion County real estate be not sold within said period of one year for said sum of Eighteen Thousand ($18,000.00) dollars, plus commission, then after ninety (90) days' notice in writing to be given to first parties by second party, the said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring and if said Marion County real estate does not sell for lack of a bid, then second party may upon ninety (90) days' notice in writing to be given to the first parties by the second party sell and convey said Hamilton County real estate for whatever it will bring over and above the agree- and upset price of sixty-five thousand ($65,000.00) dollars, if said Hamilton County real estate does not sell for said sum of Sixty-five thousand ($65,000) dollars for lack of a bid of that sum, then the said second party hereto may publicly advertise and sell said Marion County real estate after ninety (90) days' notice given in writing to first parties by second party at public
330 auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale do not fetch enough to pay the moneys and perform the obligations herein charged upon and against said real estate then said second party may proceed to sell and sell said Hamilton County real estate in the manner and form prescribed as to said Marion County real estate. After (30) days' notice given in writing to first parties by second party.

It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of said real estate made pursuant to this agreement, as follows:

(1) To the payment of any mortgage or other valid, liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

(2) To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties as herein authorized and provided.

(3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as hereinbefore authorized and provided.

(4) The rest and residue of any money shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

Paragraph 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant
331 to the provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if such deed were made by the said first parties in their own proper persons, names and rights. And the said first parties so now hereby ratify approve and confirm any and every such deed made by second party pursuant to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

Paragraph 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors, and assigns. In execution whereof the several prospective parties have hereunto affixed their hands and seals at the date and place first above written.

(Signed) DORA E. ROOKER.
WILLIAM V. ROOKER.
[SEAL.] FIDELITY TRUST COMPANY.
Per W. M. FOGARTY,
President.

Attest:
THOMAS B. FULMER,
Secretary.

Sixth. That since the execution of said warranty deeds and said written memorandum, the plaintiff Dora E. Rooker has continued in the possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the plaintiffs William V. Rooker and Dora E. Rooker have continued in the possession of and farmed all of the real estate situated in Marion County, Indiana, and are now in possession thereof.

Seventh. That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff Dora E. Rooker has received all of the proceeds arising out of the
332 Hamilton County real estate and has not at any time rendered an accounting to the Fidelity Trust Company, Trustee

and the plaintiff- William V. Rooker and Dora E. Rooker have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company, trustee.

Eighth. That Fidelity Trust Company, trustee has not sold or conveyed any of the real estate conveyed to it by plaintiffs and that the title of the same is now in the said Fidelity Trust Company, Trustee, and that said Fidelity Trust Company is not claiming or asserting any other title than the title and right set forth in the deeds of conveyance and memorandum of trust, thereinafter set out in these findings.

Ninth. That prior to the commencement of plaintiffs' action, namely on or about the 15th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company Trustee, served a written notice upon the plaintiffs demanding the payment of a certain sum aggregating nineteen Thousand six hundred four dollars and four ($19,604.04) cents and tendered for delivery its quit claim conveying and quit claiming said Hamilton County and Marion County lands to the original grantors upon the payment of the aforesaid sum on demand and stating that said quit claim deeds will remain in the office of Fidelity Trust Company for delivery until October 30th, 1912 upon payment of the demand.

Tenth. That the plaintiff Dora E. Rooker, in the construction of her dwelling house on the Hamilton County land contracted
333 large liabilities to various persons, firms and corporations for work and labor done and materials furnished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said Fidelity Trust Company Trustee, under said contract and upon the security evidenced by said two separate warranty deeds, and agreement of trust, all executed and delivered October 11, 1909, did, from time to time thereafter upon the written order and direction of the plaintiff, Dora E. Rooker, first pay out the total sum of Six Thousand ($6,000) dollars and did further, after paying on the said written order and direction of said Dora E. Rooker the total sum of Six Thousand ($6,000.00) dollars let out and expended a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the plaintiff Dora E. Rooker issued from time to time to the defendant and cross-complainant Fidelity Trust Company directing the payment of certain obligations showing on their face the nature of the claim, the amount thereof, and the party to whom payment should be made, and that the signature affixed thereon is the signature of the plaintiff Dora E. Rooker.

Eleventh. That said Fidelity Trust Company made payment on such written orders issued from time to time by the plaintiff Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff Dora E. Rooker and receipted by the respective parties in whose favor the voucher is drawn, as follows:

Oct.	16, 1909.	Fidelity Trust Company	$393.20
Oct.	13, 1909.	Indianapolis, Mortar & Fuel Co.	60.00
334			
Oct.	13, 1909.	Balke Krauss Co	$1,000.00
Oct.	14, 1909.	W. H. Johnson & Son Co.	400.00
Oct.	16, 1909.	Fidelity Trust Co.	350.00
Oct.	16, 1909.	Fidelity Trust Co.	300.75
Oct.	16, 1909.	Pay roll and Sundry Items	300.00
Oct.	22, 1909.	Pay roll and Sundry upon receipt of William V. Rooker	350.00
Oct.	30, 1909.	Pittsburg Plate Glass Co.	265.00
Nov.	9, 1909.	W. R. Evans Co.	73.00
Nov.	17, 1909.	Dora E. Rooker, on account Daniel Stewart Paints Co.	60.88
Nov.	27, 1909.	William V. Rooker	100.00
Nov.	24, 1909.	Humphreys & Sargent	400.00
Dec.	4, 1909.	Pay Roll & Sundries, Lime ect.	85.00
Dec.	10, 1909.	Wm. V. Rooker acct.	45.00
Dec.	15, 1909.	Western Brick Company	20.00
Dec.	18, 1909.	William V. Rooker, acct.	25.00
Dec.	24, 1909.	Wm. V. Rooker for farm pay roll.	35.00
Dec.	31, 1909.	Wm. V. Rooker, acct.	25.00
Dec.	31, 1909.	Lilly & Stalnaker acct.	300.00
Dec.	31, 1909.	W. H. Johnson & Son Co.	400.00
Jan.	6, 1910.	" " " "	50.00
Jan.	15, 1910.	William V. Rooker	35.00
Jan.	31, 1910.	Payment of certain notes herein designated on account of Dora E. Rooker, Tr.	832.50
Jan.	31, 1910.	W. V. Rooker	65.00
Feb.	15, 1910.	W. V. Rooker	50.00
Feb.	25, 1910.	Hetherington & Berner	182.65
Feb.	25, 1910.	Stewart Carey Glass Co.	2.66
Feb.	28, 1910.	W. V. Rooker	45.00
Mar.	31, 1910.	W. V. Rooker	62.50
335			
Apr.	7, 1910.	Le Roy J. Patty	384.63
Feb.	24, 1910.	Geo. W. Keyser, acct.	400.00
Apr.	11, 1910.	Lacy Deed & Hay Co.	184.50
Apr.	15, 1910.	W. V. Rooker.	62.50
Apr.	18, 1910.	Balke & Krause Co. Acct.	2,595.23
Apr.	29, 1910.	W. V. Rooker	62.50
May	11, 1910.	W. V. Rooker	62.50
May	28, 1910.	W. V. Rooker	62.50
Jun.	15, 1910.	Dora E. Rooker Trust	148.50
Jun.	30, 1910.	W. V. Rooker	130.00
June	24, 1910.	Kane and Kane Atty.	325.00
July	15, 1910.	W. V. Rooker	220.00

May	11, 1910.	Citizens State Bank	1,473.76
Aug.	26, 1910.	Illinois Surety Co.	505.00
Nov.	27, 1910.	American Central Life Ins. Co.	420.00
May	3, 1910.	American Cen. Life Co.	420.00
Nov.	19, 1910.	" " " "	420.00
May	1, 1911.	" " " "	420.00
Nov.	17, 1911.	" " " "	420.00
May	19, 1912.	" " " "	420.00
Dec.	10, 1909.	Indianapolis Cen. Life Ins. Co.	182.70
Apr.	16, 1910.	" " " " "	180.00
		Aggregating the sum of	$15,813.21

Twelfth. That said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts, to-wit:

Mar.	13, 1917.	Balke & Krause Co. on account of foreclosure of mechanic's lien on the Hamilton County land	$57.51
Oct.	13, 1910.	Indianapolis Life Ins. Co. interest on the mortgage on Marion County lands	180.00
July	12, 1912.	Indianapolis Life Ins. Co. int. on mortgage on Marion County lands	565.00
Nov.	13 1913.	Indianapolis Life Ins. Co. int. on mortgage Marion Co. lands	622.08
July	31, 1913	American Central Life Ins. Co. int. on mortgage on Hamilton Co. lands	426.72
Oct.	21, 1910.	Taxes on Marion County land including penalties	99.37
Oct.	21, 1910.	Taxes on Marion Co. lands including penalties	59.14
Apr.	21, 1911.	Taxes on Marion Co. land	11.60
Apr.	21, 1911.	Taxes on Marion Co. land	27.84
Nov.	9, 1912.	Taxes on Marion Co. land including penalties	92.10
Nov.	4, 1912.	Taxes on Marion Co. land	27.36
Apr.	15, 1913.	Taxes on Marion Co. land	14.96
Apr.	15, 1913.	Taxes on Marion Co. land	27.90
Feb.	5, 1914.	Taxes on Marion Co. land including penalties	123.73
Feb.	14, 1916.	Taxes on Marion Co. land	32.54
Oct.	14, 1916.	Taxes on Marion Co. land	43.75
Oct.	14, 1916.	Taxes on Marion Co. land	18.48
Oct.	25, 1916.	Taxes on Marion County land	44.25
Oct.	25, 1916.	Taxes on Marion County land	18.45

May	18, 1910.	Taxes on Hamilton County land..	78.52
Oct.	14, 1910.	Taxes on Hamilton County land..	64.32
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Apr.	29, 1911.	Taxes on Hamilton County land..	159.34
Nov.	5, 1912.	" " " " " ..	444.34
May	5, 1913.	" " " " " ..	135.20
June	29, 1916.	" " " " " ..	855.10
Oct.	14, 1916.	" " " " " ..	319.15
Jun.	25, 1913.	Will F. Wall, Clerk of the Ham. Co. Cir. Court in payment of judgment ..... And interest in the case of foreclosure of mechanics lien of Ludowici Caladron Co	442.42
June	25, 1912.	J. Fred France, Clerk of the Appellate Court costs in the case of Ludowici Caladron Co.....	28.70
Sept.	17, 1914.	Fire Insurance on improvements on Marion County lands.....	96.00
Apr.	28, 1916.	Fire Ins. on improvements on Marion County lands.....	40.50
Nov.	21, 1913.	American Central Life Ins. Co. in payment of the mortgage and accrued interest on Hamilton Co. lands	11,424.50
Nov.	25, 1912.	Kane and Kane attorneys on account of legal services rendered in foreclosure suits brought in Ham. Co. Cir. Court.....	50.00
June	22, 1912.	Ham. Trust Co. continuation of abstract for Hamilton Co. lands...	2.00
Apr.	14, 1913.	Ham. Trust Co. continuation of abstract for the Hamilton Co. lands.	6.00
Mar.	6, 1912.	W. M. Coval & Sons, continuation of abstract for Marion Co. lands.	3.50
Mar.	18, 1913.	W. M. Coval & Sons, continuation of abstract for the Marion Co.	
338		lands	2.50
June	14, 1917.	Taxes on Marion County lands....	39.86
Jun.	14, 1917.	Taxes on Marion County lands....	87.46
Apr.	31, 1918.	Taxes on Marion County lands....	18.48
Apr.	13, 1918.	Taxes on Marion County lands....	43.40
June	16, 1917.	Taxes on Hamilton County lands..	447.78
Apr.	11, 1918.	Taxes on Hamilton County lands..	198.75
Aug.	10, 1917.	Insurance on the improvements on the Marion County lands.....	136.50
		Aggregating the sum of.....	$21,194.27

Thirteenth. That no assets came into the possession of the Trustee other than the lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company of Indianapolis, Indiana, a corporation engaged in the business of operating a trust company under the laws of the state of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

Fourteenth. That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, Trustee, is entitled to have and receive for its compensation, a trustee's fee of one hundred and fifty ($150.00) dollars, which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of two (2) per cent on loans and advancements and all moneys laid out and expended, of which one hundred and twenty ($120.00) dollars has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant is further entitled to have and receive interest on all moneys loaned or advanced at the rate of six (6) per cent per annum.

Fifteenth. That the plaintiffs are entitled to the following credits, to-wit: Ninety-five ($95.00) dollars, together with interest thereon at six (6) per cent from October 16, 1909, on account of the cancellation of insurance policy of Six Thousand ($6,000.00) dollars, said sum having been charged against plaintiffs under order and voucher dated October 16, 1909; also a credit of five hundred ($500.00) dollars with interest at four (4) per cent from August 26, 1910 less Fifteen ($15.00) dollars deducted from the principal amount as a premium upon the surety Company bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company, as col-at/eral on a supersedeas in the case of William V. Rooker and Dora E. Roker vs. Ludowoco Celadon Company in the Appellate Court, which cause was affirmed on appeal and upon the judgment being paid said security of deposit returned; also a credit of four hundred and two and 81/100 dollars ($402.81) representing the various amount of penalties and costs including in various payments for taxes on the Marion County lands.

Sixteenth. There *there* is now due and owing to the defendant and cross-complainant herein from the plaintiffs cross-defendants herein, the principal sum of thirty-seven Thousand and seven and 48/100 ($37,007.48) dollars; and for the interest thereon, the aggregate sum of Fourteen Thousand two hundred Twenty one and 29/100 ($14,271.29) dollars; and for commission at two (2) per cent on all funds paid out in excess of Six Thousand ($6,000.00) dollars the aggregate sum of Six Hundred and twenty and 14/100 ($1,620.14) dollars from which there shall be deducted the aggregate sum of Nine hundred eighty-two and 81/100 (982.81) dollars, together with interest thereon amounting

to Two hundred and eighteen and 51 100 ($281.51) dollars, being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein in the sum of Fifty Thousand six hundred and ninety seven and 59 100 ($50,697.59) dollars.

Seventeen. That all the amounts advanced and paid out by the defendant Fidelity Trust Company, Trustee, as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker, and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company Trustee, is entitled to reimburse itself therefore according to the terms of trust agreement by the sale of said lands therein provided.

Eighteenth. That on the 21st day of June, 1917, the defendant Fidelity Trust Company as Trustee, served a notice upon William V. Rooker and Dora E. Rooker, of which the following is a copy:

"To William V. Rooker and Dora E. Rooker:

Pursuant to the provisions of the deed of conveyance executed to the undersigned as Trustee, on the 11th day of October, 1909, conveying to the undersigned as Trustee, the following described real estate in Marion County, State of Indiana, to-wit:

341 The southeast quarter of the northeast quarter of section 33, township 17 north, range 4 east, containing 40 acres, more or less; also the southwest quarter of the northwest quarter of section 34, township 17 north, range 4 east, containing 40 acres more or less, and the memorandum executed concurrently therewith, notice is hereby given that the Fidelity Trust Company as Trustee, will ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the purchaser.

Date- at Indianapolis, Indiana, this 21st day of June, 1917.

FIDELITY TRUST COMPANY,
Trustee.

By W. M. FOGARTY,
President.

Attest:
JAMES G. FLAHERTY,
Secretary.

Nineteenth. That after the execution of said deeds of conveyance and written memorandum set forth in paragraphs of this finding designated third, fourth, and fifth, and prior to the demand for repayment and tender of deed of re-conveyance set forth in the

ninth paragraph of this finding, the plaintiff William V. Rooker acting for himself and his wife, and co-plaintiff Dora E. Rooker, did on several occasions express and convey to defendant the Fidelity Trust Company their intentions to pay off the advancements, more specifically set forth in this finding, theretofore made by it under said deeds and memorandum and take reconveyance of said land and otherwise by their course and contract did induce said demand for repayment and tender of reconveyance.

342 Twentieth. That said Fidelity Trust Company Trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said Trust Agreement, hereinbefore set out, but that said Marion County lands were not sold within one year after the execution of said memorandum and deeds and have not yet been sold by said trustee under said trust provisions; that ninety (90) days' notice in writing was given, as set forth in the previous findings, notifying plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that the plaintiffs have been, were then, and are now, asserting an interest in said lands adverse to the rights of said trust Company, as trustee and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands, adverse to the right of said Trust Company, as trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above.

That the plaintiffs, in open court, have disputed and now deny, the right of said Trust Company as Trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and now are resisting the sale of said lands or any of them by said Trustee, and are now prosecuting an appeal in the appellate court from a judgment of the Marion County Circuit Court, quieting the title of the Marion County lands in said Fidelity Trust Company as Trustee, and enjoining the plaintiffs herein from
343 denying or disputing the title of said Fidelity Trust Company as trustee to said Marion County lands and from denying, disputing, obstructing or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust.

That the assertion of interest in said lands by plaintiffs as hereinabove stated adverse to the interest of Fidelity Trust Company as trustee under said trust agreement is unfounded and without right.

Upon the foregoing facts the court states the following conclusions of law.

1. The law is with the defendant on the issues joined on plaintiffs' complaint.

2. The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

3. The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant Fidelity Trust Company, trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

4. The defendant and cross-complainant Fidelity Trust Company is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

5. The defendant and cross-complainant is entitled to
344 judgment on account in the sum of $50,697.00 to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

6. The defendant and cross-complainant is entitled to recover its costs in this action taxed at $—.

EARL SAMPLE,
Special Judge.

And the plaintiffs now file their several motions for judgment on the foregoing special finding of facts which several motions read as follows:

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

v.

FIDELITY TRUST COMPANY et al.

The plaintiffs each respectively move the court for judgment herein, in their favor, on the special findings of fact.

CHRISTIAN & WALTZ,
W. V. ROOKER,
Attorneys for Plaintiffs.

Said motions for judgment of special finding of facts are now overruled by the court to which ruling of the court each of the plaintiffs at the time separately and severally except. And each plaintiff separately and severally excepts to each of the foregoing conclusions of law. And the court now enters judgment as follows:

Come now the parties and the Court having found the
345 facts specially and stated its conclusions of law thereon now renders judgment according.

It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company had not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant Fidelity Trust Company, as such trustee holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen
346 (18) township eighteen (18) north, range five (5) east lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and East of White River, containing forty-eight (48) acres more or less.

Also the southeast quarter of section twelve (12) township eighteen (18) north, range four (4) east containing sixty (60) acres more or less and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13) township eighteen (18) north, range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty two rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy five (75) acres, more or less," situated in Hamilton County, Indiana. And

"The southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north, range four (4) east containing forty (40) acres more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north range four (4) east, containing forty (40) acres, more or less situated in
347 Marion County Indiana.

It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, Trustee, is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand Six Hundred ninety-seven ($50,697.00) dollars.

It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker by said deed of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof, and the use, rents and profits thereof, and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement. That any other interest in or control over said lands then said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said Trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both, hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to
348 its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in givin- possession or in taking possession when sale shall have been made of said lands, as aforesaid.

It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as such trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof, in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand ($18,000.00) dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, for-with for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said Trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will

bring over and above the upset price of Sixty-five Thousand ($65,-
000.00) dollars; that if said Hamilton County lands do not
349 sell, for said sum of Sixty five Thousand ($65,000) dollars,
for lack of a bid for that sum, then said trustee, after ninety
(90) days' notice in writing to the Plaintiffs of their intention to so
do, shall sell said Marion County lands at public auction for what-
ever sum and price they may bring, using diligence to procure the
highest and best price obtainable therefor; that if upon any sale of
the Marion County lands under this decree they do not fetch enough
to pay the moneys and perform the obligations against said trust es-
tate, in this action found to exist and to be due, then said trustee
shall after giving thirty (30) days' notice to said plaintiffs of their
intention so *do* do, proceed to sell, and sell and convey said Hamil-
ton County lands for whatever sum and price they will bring using
diligence to procure the highest and best *dib* therefor. That any
sale or sales made under this decree shall be forthwith submitted to
this court for approval or disapproval.

It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

1. To the payment of the costs of this action.

2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

3. To the payment of said Fidelity Trust Company of the
350 judgment on account herein decreed in the sum of Fifty
Thousand Six Hundred Ninety-seven ($50,697) dollars.

4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

5. The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrator and assigns.

EARL SAMPLE,
Special Judge.

"And afterwards to-wit on the 2nd day of January, 1919, the same being the 76th Judicial Day of the October Term 1918, the following further proceedings were had in the said cause to wit:

Come now the plaintiffs and file the motion to modify the judgment, which motion reads as follows:

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court, January Term, 1918.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST CO. et al.

Motion to Modify Judgment.

The plaintiffs, Dora E. Rooker and William V. Rooker, each separately move the court to modify the judgment herein in each, severally, of the particulars following, to wit:

Particular No. 1. To strike out from the entry of said judgment the following words: "It is, therefore, considered, ordered, ad-
351 judged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described" and for cause plaintiffs say that so much of said entry as above quoted contervenes the law of the case as decided by the Supreme Court on the former appeal.

Particular No. 2. To strike out and suppress from said entry of judgment the following words, to-wit: "It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company, has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings" and for cause plaintiffs say that so much of said entry of judgment as quoted above contervenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

Particular No. 3. To strike out and suppress from said entry of judgment the following words, to-wit: "By taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands, as trustee for the sole purpose of completing its duties and obligations, as such trustee by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement, and not otherwise, and in no other capacity," and for cause plaintiffs say that so much of said entry of judgment as quoted above contervenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

352 Particular No. 4. To strike out and suppress from entry of judgment the following words, to wit: "That said de-

fendant and cross-complainant, Fidelity Trust Company, as such trustee holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands by deeds of warranty of the fee simple title, and give full possession of the same," and for cause plaintiffs say that so much of said entry of judgment as quoted above *countervenes* the law of the case as adjudged by the Supreme Court on the former appeal in this case.

Particular No. 5. To strike out and suppress from entry of judgment the following words, to wit: "It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sale of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand six hundred ninety-seven dollars," and for cause plaintiffs say that *that* so much of said entry of judgment as quoted above *countervenes* the law of the case as adjudged by the Supreme Court on the former appeal in this case.

Particular No. 6. To strike out and suppress from entry of judgment the following words, to wit: "It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deeds of conveyance and trust agreements have parted with all their title to said real estate and appurtenances thereunto belonging and the right to the possession thereof, and the use, rents and profits thereof, and have no interest therein
353 other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker, be and they are, each and both, hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession of use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands, by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession, and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid," and for cause plaintiffs say that so much of said entry of judgment as quoted above *countervenes* the law of the case as adjudged by the Supreme Court on the former appeal in this case, and the plaintiffs would further show unto the court that said trust was not at any time a trust of or representing a trust of investment or of income, but said trustee was solely a trust affecting the prin-

cipal of said trust estate and said trustee was to have been
354 active only in making the trust sale in the matter of converting said trust estate into cash and the maintenance of said trust estate pending the sale and the distribution of the proceeds of said trust estate and was not at any time a trust affecting the possession, rents and profits thereof prior to such sale.

Particular No. 7. To strike out and suppress from the entry of judgment the following words, to wit: "It is further considered, ordered adjudged and decreed that said Fidelity Trust Company as trustee proceed under the power and according to the terms of said deeds and trust agreement and make *and* complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof, in possession; that said Marion County lands having failed to sell for the sum of eighteen thousand ($18,000) dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of sixty five thousand ($65,090.00) dollars; that if said
Hamilton County lands do not sell for said sum of sixty-
355 five thousand dollars ($65,000.00) for lack of a bid for that sum, then said trustee, after ninety (90) days' notice in writing to plaintiffs of their intention so to do, shall sell said Marion county lands at public auction for whatever sum and price they may bring using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands under this decree they do not fetch enough to pay the moneys and perform the obligations against said trust estate in this action found to exist and to be due, then said trustee shall, after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval," that for cause plaintiffs say that so much of said entry of judgment as quoted above *contravenes* the law of the case as adjudged by the Supreme Court on the former appeal in this case.

Particular No. 8. To strike out and suppress from the entry of judgment the following words, to wit. "It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sale or sales as follows: (1) to the payment of the costs of

this action. (2) To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company trustee. (3) To the payment to
356 said Fidelity Trust Company of the judgment on account herein decreed in the sum of fifty thousand six hundred ninety-seven ($50,697.00) dollars. (4) To the reimbursement of said Fidelity Trust Company of any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree. (5) The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrator and assigns," and for cause plaintiffs say that so much of said entry of judgment as quoted above *contervenes* the law of the case as adjudged by the Supreme Court on the former appeal in this case.

CHRISTIAN & WALTZ.
W. V. ROOKER.
Attorneys for Plaintiffs.

"And afterwards to wit *in* the 15th day of January, 1919, the same being the 3rd Judicial Day of the January term 1919 of said court, the following further proceedings were had to-wit:" Come now the plaintiffs and file motion for a new trial, which motion reads as follows:

STATE OF INDIANA,
Hamilton County, ss:

In the Hamilton Circuit Court.

No. 16338.

DORA E. ROOKER et al.

vs.

FIDELITY TRUST COMPANY et al.

Motions for New Trial.

The plaintiffs each and separately and severally move the court for a new trial herein for each of the following separate causes, viz:

1. That each the sixth, seventh, eighth, tenth, eleventh,
357 twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth and twentieth special findings of facts separately and severally considered, is not sustained by sufficient evidence.

2. That each the sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth sixteenth, seventeenth, eighteenth, nineteenth and twentieth special findings of facts separately and severally considered is contrary to law.

3. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty viz: "and whether or not the Fidelity Trust Company paid to the party in whose favor that voucher is drawn the amount of money therein specified, namely, sixty dollars," and in admitting in evidence the answer thereto.

4. The court erred at the trial of the cause in overruling the *pal*intiffs' objections to the introductions in evidence *if* defendants' exhibit No. 3 in favor of George Keyser in the sum of four hundred dollars, and in admitting said exhibit in evidence.

5. The court erred at the trial of the cause in overruling the plaintiffs' motions to strike from their counter claims and answer, the name of the Fidelity Trust Company in its co-porate capacity proper, "and we ask that that motion be extended to include all pleadings in which the Fidelity Trust Company as trustee and Fidelity Trust Company in its co-porate capacity proper appear to be jointly litigating these particular rights."

6. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of de-
358 fendants' exhibit No. 4 and in admitting said exhibit in evidence.

7. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 5 and in admitting said exhibit in evidence.

8. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 6 and in admitting said exhibit in evidence.

9. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 7 and in admitting said exhibit in evidence.

10. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question, put to William M. Fogarty, viz: "I will ask you further question, whether or not this check was in payment of the judgments on mechanics' lien taken against Mrs. Rooker's property in Hamilton County," and in admitting in evidence the answer thereto.

11. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 8 and in admitting said exhibit in evidence.

12. The court erred at the trial of the cause in overruling plaintiffs' objections to the following question put to William M. Fogarty, viz: "Here is fifty-six for accumulation of interest on same loan," and in admitting in evidence the answer thereto.

359 13. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence *if*

defendants' exhibit No. 11, and in admitting said exhibit in evidence.

14. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 16 and in admitting said exhibit in evidence.

15. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 19 and in admitting said exhibit in evidence.

16. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 20 and in admitting said exhibit in evidence.

17. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 28 and in admitting said exhibit in evidence.

18. The court erred at the trial of the cause in overruling plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 32 and in admitting said exhibit in evidence.

19. The court erred at the trial of the cause in overruling plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 33 and in admitting said exhibit in evidence.

20. The court erred at the trial of the cause in overruling plaintiff's objections to the introduction in evidence *if* defendants'
369 exhibit No. 34 and in admitting said exhibit in evidence.

21. The court erred at the trial of the cause in overruling plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 37 and in admitting said exhibit in evidence.

22. The court erred at the trial of the cause in overruling plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 49 and in admitting said exhibit in evidence.

23. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz: "You may state whether or not the Fidelity Trust Company as trustee in this estate, trustee of the estate, had any funds which belonged to the trust," and in admitting in evidence the answer thereto.

24. The court erred at the trial of the cause in overruling plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 53 and in admitting said exhibit in evidence.

25. The court erred at the trial of the cause in overruling plaintiffs' objections to the following question put to William M. Fogarty, viz: "Now, you may state whether pursuant to that notice, you are able to make sale of the Marion, County land," and in admitting in evidence the answer thereto.

26. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz: "You may state whether or not they ever
361 turned into you any of the proceeds of the land," and in admitting in evidence the answer thereto.

27. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz: "What did he say to that," and in admitting in evidence the answer thereto.

28. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz: "You may state whether or not Rooker in open court, there claimed on behalf of himself and his wife, the plaintiffs in that action, to be the owners of the property and asked and insisted upon the court quieting title in them," and in admitting in evidence the answer thereto.

29. The court erred at the trial of the cause in overruling the plaintiffs' motion to strike out the following answer given by William M. Fogarty, viz: "That the title should be quieted by that proceeding in himself and his wife, Dora E. Rooker."

30. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to Henry Seyfried, viz: "I will ask you to state whether your intervention in that case was for the purpose of sustaining the American Central Life Insurance mortgage," and in admitting in evidence the answer thereto.

31. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of
362 defendants' exhibit No. 54 and in admitting said exhibit in evidence.

32. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' exhibit No. 55 and in admitting said exhibit in evidence.

33. That there is error in the assessment of defendants' damages, the same being too large.

34. That there is error in the assessment of Plaintiffs' damages, the same being too small.

WM. V. ROOKER,
CHRISTIAN & WALTZ,
Attorneys for Plaintiffs.

"And afterwards to-wit on the 5th day of February 1919, the same being the 21st Judicial Day of the January term, 1919, of said court, the following fu-ther proceedings were had in said cause to-wit:

Come again the parties, and the court now overrules the motion of the plaintiff to modify the judgment herein, to which ruling of the court, the plaintiffs at the time except.

And the court now overrules Plaintiffs' motion for a new trial, herein to which ruling of the court the plaintiffs at the time except.

And the plaintiffs now pray an appeal to the Supreme Court of the State of Indiana, which is granted in Term on condition that the plaintiffs shall file herein, within thirty days' time their appeal bond in the sum of $65,000.00 with the Aetna Life Insurance Co., Bond Department as Surety, which surety is now approved by the court. And sixty days' time is now given to the plaintiff to file all bills of exceptions.

EARL SAMPLE,
Special Judge.

363 Comes now Maude I. Dale, official reporter, and files in the Office of the Clerk of this Court, in this cause her long hand transcript of her short-hand notes of the evidence given and offered and the rulings made on the trial of said cause. Which said long-hand transcript is in the words and figures following towit: (H. I.)

(This transcript of evidence was subsequently incorporated in a bill of exceptions containing the evidence filed in this cause on April 28th, 1919.)

That afterwards to wit: On the 28th day of April, 1919, the same being the 19th Judicial day of the April term, 1919 of said court the following further proceedings were had in said cause to wit:

Came the parties and the Honorable Earl Sample, Special Judge having heretofore taken under advisement the bill of exceptions tendered containing a transcript of the evidence, now in all things approves said bill of exceptions and allows the same, and orders that said bill of exceptions be filed and made a part of the record of the court in this cause. And said bill of exceptions is now so filed and is in the words and figures following to wit:

361 STATE OF INDIANA,
County of Hamilton, ss:

In the Hamilton Circuit Court, April Term, 1918.

No. 16338.

Hon. Earl O. Sample, Special Judge.

WILLIAM V. ROOKER, DORA E. ROOKER

vs.

FIDELITY TRUST COMPANY.

Appearance for the plaintiff:

William V. Rooker.
Christian, Christian & Waltz.

For the Defendant:

Henry Seyfried.
Judge C. E. Cox.
Thomas E. Kane.

Maude I. Dale, Reporter Hamilton Circuit Court.
Filed Mar. 28, 1919.

CHAS. J. NEWBY,
Clerk Hamilton Cir. Court.

365 Be it remembered, That on the 30th day of July, 1918, the same being the 104th Judicial Day of the April Term, 1918, of the Hamilton Circuit Court of Hamilton County, in the state of Indiana, and continuing thereafter on the 31st day of July, 1918, the same being the 105th Judicial Day of said term, the following proceedings were had before the Hon. Earl. O. Sample, Special Judge of said court, to-wit:

The cause being at issue, the same came on for trial before the court, a jury being waived by the parties. William V. Rooker, Esq. and Christian, Christian and Waltz, Esqs., appearing for the plaintiffs, and Henry Seyfried, Esq., Judge C. E. Cox, Esq. and Thomas E. Kane, Esq. appearing as counsel for the Defendant.

Be it further remembered, That, before the trial was begun, for the purpose of facilitating *the* expediting the trial of said cause, said Judge required to be present Maude I. Dale, the Official Reporter of said court, to take down in shorthand the oral evidence, including both questions and answers, and note all rulings of the Court in respect to the admission and rejection of evidence, and the exceptions taken thereto, and documentary evidence offered and introduced on the trial of said cause. The said Maude I. Dale having been, at the time of her appointment, duly sworn faithfully to perform her

duties as such Official Shorthand Reporter, which appointment and her official oath as such reporter are all among the records of said court.

And be it further remembered, That said official reporter
366 was present and took down in shorthand the oral evidence, and transcribed the documentary evidence given upon the trial of said cause, including both questions and answers, and noted all the objections made to the admission of evidence, all of the rulings of the court with respect to the admission and rejection of evidence, and the exceptions taken thereto.

And the said William V. Rooker, plaintiff, having requested said official Reporter to furnish him with a complete transcript of said evidence, the rulings of the court thereon, exceptions thereto, including all documentary evidence, a typewritten transcript of the same was made by the said Official Reporter, which typewritten transcript is in the words and figures following, to-wit:

And the Plaintiffs, to maintain and support the issues on their behalf, offered and introduced the following evidence, to wit:

367 WILLIAM M. FOGARTY, witness called for plaintiffs, being first duly sworn to testify the truth the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. Wm. V. Rooker:

Q. You may tell the Court your name?
A. William M. Fogarty.
Q. Where do you reside, Mr. Fogarty?
A. Indianapolis.
Q. What is your business, or occupation?
A. President of the Fidelity Trust Company.
Q. That is the defendant in this case?
A. Yes.
Q. How long have you been President, Mr. Fogarty?
A. Since 1909.
Q. That was the beginning of the Trust Company?
A. Yes, sir.
Q. Mr. Fogarty, I direct your attention to a memoranda executed between the plaintiffs in this case, and the Fidelity Trust Company, in October, 1909, and ask you whether you have that present in court?
A. Yes.
Q. Will you let me have it?
A. I thought you had reference to the trust deed.

368 (By the Court:) This may go in in evidence, and if it is objected that it is not the original, the original will be substituted as Exhibit No. 1 by the court.

Q. Mr. Fogarty, I will ask you to look at this memoranda and tell the Court if it is the contract, or a memoranda thereof, that was made between the Fidelity Trust Company and the plaintiffs in this case on October 11, 1909?

A. Yes, sir.

By the Court:

Q. That is the contract, is it?

By Mr. Rooker:

Q. Yes, that is the contract with the two deeds, is it not?

A. Yes.

Q. Now, Mr. Fogarty, after the making of this contract, the Fidelity Trust Company as Trustee entered upon the performance of the contract?

A. Yes, sir.

Q. And I will ask you to look at this memoranda which I will have the reporter mark for identification as Plaintiffs' Exhibit No. 1, and tell the Court if you executed that contract as President of the Fidelity Trust Company?

A. Yes.

Q. Except the lead pencil memoranda on the bottom?

A. Yes, that is not a part of it.

The plaintiffs, by counsel, now offer to introduce and read in evidence the paper which has been marked by the reporter for
369 identification as Plaintiffs' Exhibit No. 1, being the trust contract and deed.

(By the Court:) Any objections to it?

(By Mr. Seyfried:) None at all.

(By the Court:) It may go in.

The plaintiffs, by counsel, then introduced in evidence and read to the court plaintiffs' Exhibit No. 1, which Exhibit is in the words and figures following, to-wit:

PLAINTIFF'S EXHIBIT NO. 1.

"Memorandum."

This memorandum, executed in duplicate at the city of Indianapolis, Indiana, this 11th day of October, 1909, by and between Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, Indiana, first parties, and the Fidelity Trust Company of Indianapolis, Indiana, second party,

Witnesseth:

Par. 1. That concurrently herewith and as a part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general war-

ranty deed, conveyed to second party as Trustee, ever upon the conditions and trust and upon the powers and for the uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, to-wit:

The southwest quarter of the northeast quarter of section 33 township 17 north, range 4 east containing 40 acres more or less.

Also the southwest quarter of the northwest quarter of section 34 township 17 north, range 4 east containing 40 acres more or less.

Also the following real estate in Hamilton County, in the State of Indiana, to-wit:

All the west half of the north half of section 18, township 18 north, range 5 east, lying west of the Lake Erie and Western Railroad, containing 92 acres more or less.

Also the southwest quarter of section 7 township 18 north, range 5 east, lying west of Lake Erie and Western Railroad and east of White River, containing 48 acres more or less.

Also the southeast quarter of section 12 township 18 north, range 4 east containing 60 acres more or less and lying south and east of White River.

Also all that part of the northeast quarter of section 13 township 18 north, range 4 east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hudred and thirty-two rods more or less to White River, thence southerly along with said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing 75 acres more or less.

That reference is hereby made to the said warranty deed, and to the several descriptions therein for greater certainty.

Par. 2. That said warranty deed is made ever upon the conditions and trust and upon the powers and for the uses and purposes herein particularly set forth, that is to say:

Whereas, the said Dora E. Rooker, the grantor in said deed and first party herein, is the owner in her own and separate right and estate of the said above described lands situate in said Hamilton County, and the said Dora E. Rooker and William V. Rooker, her husband, grantors in said deed, and parties of the first part herein are the owners as tenants by the entireties of said real estate situate in said Marion County, and

Whereas, the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, has heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, and in so doing has been obliged to lay out and expend large sums of

money and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay, and

Whereas, the said improvements have been carried so far toward completion as they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; and

372 Whereas, it requires $6,000 *dollars* to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her arising out — the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of the making of said improvements,

Now, therefore, it is agreed that the said Fidelity Trust Company, second party herein, shall and it does hereby accept the title of, in and to said real estate ever upon the condition and trust and upon the powers and for the uses and purposes following, that is to say:

Clause A. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and direction of said Dora E. Rooker, not exceeding the sum of $6,000 for and on account of the erection and construction of said dwelling house, outbuildings and improvements and the equipment and installation thereof, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal of said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness shall be forever

373 binding and conclusive on all parties concerned; that such debt or debts so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

Clause B. The said Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said Trust Company may deem necessary to protect its interest in and to said real estate and to perform or better promote the performance of the trust herein and hereby created and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as full as if the same were made upon her express written direction.

Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker any such sum or sums of money, whether within or in excess of the sum of $6,000 as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

Clause D. Said Fidelity Trust Company is hereby appointed and empowered and authorized as the true and lawful attorney in fact of the second parties and in their separate deed, joint name, place, right and stead to execute a deed of general warranty or deeds of general warranty conveying said real estate or any part or parts thereof upon the limitations hereinafter stated and pro-
574 vided.

Par. 3. Said Fidelity Trust Company shall have and receive for its compensation, Trustee's fee of One Hundred and Fifty Dollars, and a commission of 2 per cent, on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with the interest on all such moneys at the rate of 6 per cent per annum to be credited semi-annually to said Fidelity Trust Company as a debt and charge against said Dora E. Rooker and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company pursuant to this agreement; and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth of one per cent for all notes for 90 days or less for moneys obtained from any bank to the credit of said Dora E. Rooker on *per* paper originally made.

Par. 4. It is further ever understood and agreed that at any time within 1 year after the date of these presents said second party may execute and perform so much of the power to sell and convey as is hereinbefore granted as pertains to said Marion County real estate, provided always that the sum received in considertion therefor shall be net to the credit of said Dora E. Rooker, $18,000 after the payment of the commission hereinbefore mentioned. Should it so happen that said Marion County real estate be not sold within
575 said period of one year for said sum of $18,000 plus commission, then after 90 days' notice in writing to be given to first parties by second party, the said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring, and if said Marion County real estate does not sell for lack of a bid, then second party may upon 90 days' notice in writing to be given to the first parties by the second party, sell and convey said Hamilton County real estate for whatever it will bring over and above the agreed and upset price of $65,000. If said Hamilton County real estate does not sell for said sum of $65,000 for lack of a bid of that sum, then the said second party hereto may publicly advertise and sell said Marion County real estate after 90 days' notice given in writing to first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale do not fetch enough to pay the moneys and perform the obligation herein charged upon and against said real estate, then said second party may proceed to sell and sell Hamilton County real estate in the manner and form prescribed as to said Marion county real estate after 30 days' notice given in writing to first parties by second party.

It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of said real estate made pursuant to this agreement as follows:

1. To the payment of any mortgage or other valid lien,
376 charge, adverse interest or incumbrance upon and against said real estate or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

2. To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties herein authorized and provided.

3. To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as hereinbefore authorized and provided.

4. The rest and residue of any money shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if deed were made by the said first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

Par. 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors and assigns.

In execution whereof the several prospective parties have
377 hereunto affixed their hands and seals at the date and place first above written.

DORA E. ROOKER.
WILLIAM V. ROOKER.
FIDELITY TRUST CO.,
Per W. M. FOGARTY,
Prest.

Attest:
THOMAS B. FULMER.
Secretary.

Deed.

This indenture witnesseth That Dora E. Rooker and William V. Rooker, her husband of Hamilton County State of Indiana.

In consideration of One Dollar ($1.00), the receipt of which is hereby acknowledged, and other good and valuable considerations by them had, Convey and Warrant, to the Fidelity Trust Company, of Indianapolis, Indiana, Trustee, the following real estate in Hamilton County, State of Indiana, to-wit:

All the west half of the north half of section eighteen (18) township eighteen (18) north range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

Also the southwest quarter of section seven (7) township eighteen (18) north range five (5) east, lying west of Lake Erie and Western Railroad and East of White River, containing forty-eight (48) acres more or less.

Also the southeast quarter of section twelve (12) township eighteen (18) north range four (4) east containing sixty (60)
378 acres more or less and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13) township eighteen (18) north range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres more or less.

To have and to hold, Said real estate, however, in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker: To execute the proper Trustee's deed or deeds conveying the title thereto in fee-simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shal- convey a good and indefeasible title in fee simple to such purchaser or purchasers, as fully as this grantor could herself do, and any such purchaser or purchaser- shall in no wise be responsible for the application
379 of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Trustee.

And said Fidelity Trust Company, of Indianapolis, as such Trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrances or convey the same subject to any existing incumbrances. And to do any and all acts and to execute any and all papers, which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforcible by it and

collectible with interest at the rate of 6% per annum, to be credited semi-annually, as a debit and charge against said real estate.

This conveyance is made, Subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of a certain principal note of said grantor in the sum of Fourteen Thousand Dollars ($14,000.00) together with interest thereon and recorded in mortgage record 52,
page 84 in the office of the Recorder of Hamilton County,
380 Indiana.

In witness whereof, Said Dora E. Rooker and William V. Rooker, her husband have hereunto set their hands and seals this 11th day of October, 1909.

DORA E. ROOKER.
WILLIAM V. ROOKER.

STATE OF INDIANA,
Marion County, ss:

Before me the undersigned, Notary Public, personally appeared William V. Rooker and Dora E. Rooker, his wife and acknowledged the execution of this deed.

Witness my Hand and Notarial Seal this 11th day of October, 1909.

[Seal Notary Public, Indiana.]

WM. J. McCOY,
Notary Public.

My Commission expires July 23, 1910.

Deed.

This identure witnesseth That William V. Rooker and Dora E. Rooker, husband and wife, of Hamilton County, State of Indiana, in consideration of One Dollar ($1.00), the receipt of which is hereby acknowledged and other good and valuable considerations by them had, convey and warrant to the Fidelity Trust Company of Indianapolis, Indiana, Trustee, the following real estate in Marion County, Indiana, to wit:

The southeast quarter of the northeast quarter of section thirty-
three (33) township seventeen (17) north range four (4)
381 east containing forty (40) acres more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north range four (4) east containing forty (40) acres more or less.

To have and to hold said real estate, however, in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company, of Indianapolis, Trustee as aforesaid to sell and convey said real estate according to the terms of

certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days' notice in writing, to be given to the grantors by the trustee herein, the Trustee may publicly advertise said real estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such Trustee to execute the proper Trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed, that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee shall convey a good and indefeasible
382 title in fee-simple to such purchaser or purchasers as fully as these grantors could themselves do and any such purchaser or purchasers shall in no-wise be responsible for the applications of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis Trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors, and said Fidelity Trust Company, Trustee, on this date.

The said Fidelity Trust Company of Indianapolis, as such Trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis Trustee shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforcible in its hands, together with interest thereon at the rate of 6% per annum, to be credited semi-annually, to said
383 Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed March 12, 1909 by the grantors William V. Rooker and Dora E. Rooker, husband and wife to Indianapolis Life Insurance Company to secure the payment of one (1) principal note of the sum of six Thousand Dollars ($6,000.00) and interest coupon notes thereon, which mortgage is recorded in mortgage record 523 page 128 in the office of the Recorder of Marion County, State of Indiana.

In witness whereof: Said William V. Rooker and Dora E. Rooker have hereunto set their hands and seals this 11th of October, 1909.

WILLIAM V. ROOKER.
DORA E. ROOKER.

STATE OF INDIANA,
Marion County, ss:

Before me the undersigned, Notary Public personally appeared William V. Rooker and Dora E. Rooker, husband and wife, and acknowledged the execution of this deed.

Witness my Hand and Notarial Seal this 11th of October, 1909.

[Seal Notary Public, Indiana.]

WM. J. McCOY,
Notary Public.

My commission expires July 23, 1910.

384 The Plaintiffs, by counsel, now offer to introduce and read in evidence the paper which has been marked by the reporter as Plaintiffs' Exhibit No. 2, being the notice of repudiation.

The plaintiffs, by counsel, then introduced in evidence and read to the Court Plaintiffs' Exhibit No. 2, which Exhibit is in the words and figures following, to-wit:

PLAINTIFFS' EXHIBIT NO. 2.

Demand and Tender of Deed.

Noblesville, Indiana.

"To Dora E. Rooker and William V. Rooker, her husband.

The undersigned, Fidelity Trust Company, Trustee, and Fidelity Trust Company, hereby demand payment to them of the sum of Eighteen Thousand Four Hundred and fifty Three Dollars and Thirty Four ($18,453.34) Cents due on account of advancements made under agreement of Trust and secured by the Hamilton County farm, and demand payment of the sum of One Thousand Two Hundred and Forty Dollars and Seventy ($1,240.70) Cents, due on account of advancements made under agreement of trust and secured by the Marion County Farm, making a total of Nineteen Thousand Six Hundred and Ninety Four Dollars ($19,694.04) Four Cents, and the said Fidelity Trust Company, Trustee, herewith tenders for delivery its quit Claim deeds, conveying and quit
385 claiming said Hamilton County and Marion County farms to the original grantors upon payment to them of the foregoing demand; and further gives notice that upon failure to make payment of the aforesaid sum upon demand now made, that said quit claim deeds will remain at the office of Fidelity Trust Company for delivery until October 30th, 1912, upon payment of the aforesaid demand.

FIDELITY TRUST COMPANY,
Trustee.

By W. M. FOGARTY, *President.*

FIDELITY TRUST COMPANY.

By W. M. FOGARTY, *President.*

Attest:

[Seal Fidelity Trust Company, Indianapolis, Ind.]

JAS. G. FLAHERTY,
Secretary."

Q. Mr. Fogarty, do you know the day on which this instrument was written?

A. Not from memory, I don't.

Q. Do you know what was done with the instrument after you prepared it?

A. Yes, sir.

Q. What?

A. It was sent to you by messenger, or officials of the Company presented it to you.

Q. By Mr. Smith and——

386 A. I believe Mr. Smith and McNulty.

Q. They were officials of the Company?

A. Yes.

Q. And were sent for the purpose of delivering this instrument?

A. Yes.

Q. Do you know the date on which they delivered it?

A. No, I don't remember.

Cross-examination.

Questions by Mr. Henry Seyfried:

Q. Mr. Fogarty, this notice was prepared by myself as attorney for the Company, was it?

A. Yes, sir.

Q. And it was prepared after Mr. Rooker was asking for more funds, was it not?

A. Yes, sir.

Q. And do you recollect what claims he was making for funds to be advanced, for what purpose?

The Plaintiffs, by counsel, object to that question for the reason it is not cross-examination.

The court sustained the objection of the plaintiffs, to which ruling of the Court the defendant, by counsel, then and there took an exception.

Q. And it was made after the Marion County land could not be sold, was it not?

The plaintiffs, by counsel, object to that, your Honor, as calling for * * *

The Court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there took
387 an exception.

Q. Mr. Fogarty, I will ask you whether or not it is not a fact that, at the time this notice was sent to Mr. Rooker and his wife, whether Mr. Rooker was not claiming that he was the owner of the land and held possession of it?

A. Yes, sir.

Q. And I will ask you whether, prior to that time, he had not promised to make payments on the advancements made?

The plaintiffs, by counsel, object to that as not being cross-examination; if they want to—they should use this witness as their witness.

The Court sustained the objection of the plaintiffs on the ground it is not cross-examination; to which ruling of the Court the defendant, by counsel, then and there took an exception.

Q. I will ask you this further question, I think it is proper cross-examination; I will ask you whether or not that notice was not sent on the honest belief, on the part of the Trust Company, that Mr. Rooker was asserting and had the right to redeem the property from the trust, by paying off the amount of money that he owed you?

388 The plaintiffs, by counsel, object to that question.

The court sustained the objection of the plaintiffs, to which ruling of the Court the defendant, by counsel, then and there took an exception.

Witness excused by the court.

JOHN D. CRAIG, witness called for plaintiffs, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

By Mr. Wm. V. Rooker:

Q. Tell the Court your name?

A. J. D. Craig.

Q. Where do you live, Mr. Craig?

A. Noblesville Township.

Q. In this County?

A. Yes.

Q. And what is your business?

389 A. I am a stock buyer, and farmer.

Q. How long have you been engaged in that business?

A. All my life.

Q. And you are now about what age?

A. Thirty-seven.

Q. Mr. Craig, are you acquainted with the Rooker farm, south of town?

A. I am.

Q. How long have you known it?

A. Oh, practically all my life.

Q. Were you acquainted with it in 1909 and prior thereto?
A. Yes.
Q. I wish you would tell the Court, describe that farm to the Court at that time?
A. In what way?
Q. How it was operated?
A. Well, there was farming just the same as all the rest of us, working right along.
Q. Did you notice the fencings or buildings at that time?
A. Why, right good fencing on the farm, and buildings were pretty good.
Q. How large a farm is it, do you know, Mr. Craig?
A. No, I could not tell you just to the acre, how many.
Q. And what kind of farming was done on it at that time?
A. I never paid so much attention only the grass around. I never paid much attention to the crops.
Q. Any stock kept there?
A. Yes.
Q. Tell the Court what you found about that.
A. I always found as good stock down there, and as fat, 230 as any in the county.

The defendant, by counsel, objects to that.

(By the Court:) That may go out.

Q. What variety of the stock?

(By the Court:) What is the object of this?
(By Mr. Rooker:) I want to show, your Honor, that the Trust Company took the deeds, and show the situation now.
(By he Court:) Go ahead.

Q. Tell the Court about that, Mr. Craig?
A. About what?

(By Mr. Seyfried:) We would like to know the purpose of this.
(By the Court:) I have asked the question myself. The thing I had in mind, while it is not clearly evidence, yet it seems to me to be the purpose of this testimony, as it is to be developed, to back up the proposition which is held untenable, that this Trust Company, by virtue of this trust agreement, was obliged to furnish the plaintiffs in this case money to buy stock and to take care of that stock, and to keep up the fencing well, leaving them in position. Of course, the contract does not go to that extent at all.
231 (By Mr. Rooker:) Nor are we claiming it does; we simply want to show, when they took these farms over, they were a going concern, that they were well fenced and well stocked and reasonably well improved; that in the administration of this trust these farms were becoming delinquent, perhaps the Hamilton County farm not even cultivated this year, and——
(By the Court:) You say this farm here is not cultivated?
(By Mr. Rooker:) No, sir.

(By the Court:) Who lives on it?
(By Mr. Rooker:) I do.

and we will say that the Marion County land was only cultivated for the period held over.

(By the Court:) How many acres in this farm?
(By Mr. Rooker:) About two hundred and seventy; I think the deeds will show the exact amount of it.

Q. That is, as to whether cattle, horses, sheep or hogs, or what?

(By the Court:) He may answer this.

A. Why, there was cattle, horses, hogs and sheep.
Q. And you may tell the court, if you know, whether or not a part of the land was cultivated in grain, corn, small grain?
A. Well, I would not say for sure, but I think may be the bottom was in corn.

392 Q. The bottom was a field embracing some one hundred or one hundred and ten acres?
A. Yes, sir, west of the house.
Q. Have you noiiced the farm in the last few years, Mr. Craig?
A. Yes, sir.
Q. I will ask you to describe its present state of repair, and its present situation with respect to its being a going institution, going concern?
A. The last time I was down past there there was none of the corn shucked in the bottom; I think that was about six weeks ago.

By the Court:

Q. There was what?
A. None of the corn shucked in the bottom field, the corn was not shucked out yet; I was driving cattle along there, and they got all over his field, no fences, some went in his corn and some went on the other side.
Q. Did you notice anything else in respect——
A. I noticed there was no cattle around there to speak of, and no sheep.
Q. Did you notice any hogs?
A. No hogs at all, that I could see.
Q. You may tell the Court whether or not, in your experience as a farmer, and in view of the fences you saw, it would be possible to keep stock on the farm?
A. I should not think you could, no.

Cross-examination.

Questions by Mr. Charles S. Cox:

393 Q. Mr. Craig, you say that you knew this farm south of town, the Rooker farms, in 1909?
A. Yes.

Q. And that the fencing and buildings were in fairly good condition at that time?

A. Yes, sir.

Q. And that there were cattle, horses, hogs and sheep on the place at that time, and that the bottoms, one hundred and ten acres, were in corn at that time, is that right?

A. I judge there were; there was generally corn around there.

Q. Who was in possession of and conducting the farm at that time?

A. Well, I could not say who the man was on the farm, Mr. Rooker lived there.

Q. Mr. Rooker?

A. Yes.

Q. And now you say that, lately, last year and this year, the farm is in bad condition?

A. Yes, sir.

Q. The fences are down?

A. Yes.

Q. The cattle, horses, hogs and sheep are all gone?

A. I didn't see but a few horses, and I think two cows; no hogs and sheep.

Q. And was the one hundred and ten acres in corn last year?

A. Yes.

Q. And that corn was not cared for, but still ungathered lately?

394 A. About six weeks ago I was past there.

Q. Who is now living *now* and has been in charge of the place?

A. Mr. Rooker lives there.

Q. And he has during all the time since 1909?

A. Yes.

Q. Now, Mr. Craig, you say that you have been a farmer and stock buyer and feeder all your—the life of your manhood?

A. Yes.

Q. And you are familiar with this farm?

A. Why, just passing, I was never over it, only when I would go down to buy stock with Mr. Rooker.

Q. Is it a good farm or poor farm?

A. I judge it is a right good farm, most of it is not bottom.

Q. And since 1909 a good farmer, or average good farmer, state whether or not—is it not a fact that a good farmer, or average good farmer could have, with that farm, and should have kept up the farm in as good condition as it was in 1909, and taken care of his crops and made some money on the farm?

The plaintiffs, by counsel, object to the question for the reason it is argumentative, and not proper cross-examination.

The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there took an exception.

395 Q. Did you have any occasion to observe the farm in 1910, Mr. Craig?

A. Well, I don't know. I was buying stuff of Mr. Rooker, or I would buy of him two or three times a year, I may have been there in 1910; I would not say I was or was not.

Q. Was there any difference in 1910 over 1909?

A. I didn't notice whether there was or not.

Q. How about 1911?

A. I could not say as to that; I have just noticed the last year or two, is all I have paid any attention, just passing.

Q. In the last year or two was the only time you have seen any deterioration in the farm?

A. That is the only time I have noticed it, yes, sir.

By the Court:

Q. Did you buy stock of Mr. Rooker since 1909?

A. Yes

By the Court:

Q. When was the last you bought off of this farm?

A. Off this farm, I think it was about a year ago last spring, if I don't forget.

Q. Was there any crop on the place, any last year, except the corn crop?

A. I could not say.

Q. Any stock, did you buy any stock last year from Mr. Rooker?

A. I don't think I did; I think it has been over a year ago since I bought stuff of Rooker.

Q. What stuff did you buy from him over a year ago?

396 A. I bought a couple of horses, and eight or ten sheep, and two cows, I think, and a calf, the last I bought of Mr. Rooker.

By Mr. T. E. Kane:

Q. Two cows?

A. Two cows and one calf, Tom.

Q. Do you know of anybody else who bought stock of Mr. Rooker, or did you buy all of his stock during these years?

A. I think I got the majority of it.

Q. You paid him for it?

A. Yes, sir.

Q. How many hogs did you buy from him each of these years?

A. Well, I just bought one wagon-load, is all I can remember of; I just bought his fat hogs.

Q. Fat ones?

A. Fat hogs, yes, sir.

Q. When did you buy them?

A. I can't just remember, but the last load I got down there is the week after he had his fire, and I can't remember when the fire was.

Q. Do you know whether Mr. Rooker sold cattle, horses, hogs and sheep to others than you?

A. Not only one bunch of hogs, is all I remember of.
Q. Do you know who he sold them to?
A. Yes.
Q. You say "bunch," how many?
A. Bought the brood sows and pigs he had on the farm.
Q. Well, about how many were there?
A. Well, I think there was about ten or fifteen sows and all their little pigs.

397 Q. When was this sale?
A. Well, I could not just exactly tell you.
Q. Well, was it this year or last year?
A. No, that has been two or three years ago.
Q. At the time he sold those brood sows and pigs, did he have corn on the place?
A. No, sir, I suppose he didn't; he said that was the reason he was selling them.
Q. How many of the pigs were there?
A. I could not tell you.
Q. Had the place been farmed to corn that year, before the sale?
A. I don't know a thing about that.
Q. You think that was two or three years ago?
A. I think it was.
Q. Well, if the farm run down, and the one who was farming it was unable to keep it up during these years, wouldn't you say, as a farmer of experience, that it was the fault of the man who was running the farm?

The plaintiffs, by counsel, object to the question, your Honor.
The Court sustained the objection of the plaintiffs, to which ruling of the Court the defendant, by counsel, then and there took an exception.

And further the witness saith not.

398 J. W. BEALS, witness called for plaintiffs, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. Wm. V. Rooker:

Q. You may tell the Court your name, please?
A. J. W. Beals.
Q. Where do you live, Mr. Beals?
A. I live here in town.
Q. And what is your business, or occupation?
A. Farming.
Q. How long have you been farming?
A. All my life.

(By the Court:) I misunderstood, I want to know what the nature of this evidence is for?

(By Mr. Rooker:) Well, Your Honor, we are contending that this trust has been wasted; it will be a law question for your Honor to say who is responsible for that waste after this evidence is all in; we simply want to show, or give your Honor an idea of the extent of it, in other words, the impairment of the trust estate, and
399 it is to that end that this testimony will be produced. I say further that I don't believe, in my theory of the case, that it is the right of the plaintiffs to recover in this case the damages; we offer this evidence for the purpose of advising the Court that this piece of property in which these parties have a joint interest is going to waste, and that it ought to be cared for, and that we think a receiver ought to be appointed for it, to preserve it and to protect the rights of all parties affected by this trust agreement, and we, in that respect, occupy the same position we did when we filed our original complaint in 1910, I believe it was, in which we asked the Court to take over this property, it was 1912, for the appointment of a receiver.

(By Mr. C. S. Cox:) If the Court please, we were somewhat at a loss to know why this evidence should be presented. It seems to us this is an astounding proposition that the plaintiffs in this case may claim, while themselves holding possession of this property, that because they have let it go to waste and ruin, that somebody ought to be appointed a receiver, when they have constituted a trustee
400 here to dispose of this property and are themselves keeping the trustee from the possession of the property and from disposing of it. I can not for a moment see that this line of testimony is proper or competent for any purpose. We are perfectly willing for the Court to investigate this matter in the fullest, but it is an astounding proposition to appeal to a court of equity for relief against their own wrong doing.

(By the Court:) I am frank to confess, gentlemen, I don't see where this evidence now will be material in this case.

The defendant, by counsel, now makes a motion, your Honor, that all of the testimony of J. D. Craig be stricken from the record, and the further motion, separate one, or rather an objection to the testimony of Mr. Beals sought to be elicited by the questions asked Mr. Beals.

(By Mr. Rooker:) As to that motion, I would like to know whether made by the Fidelity Trust Company as trustee, or the Fidelity Trust Company in its corporate capacity proper, as they are pleased to call it. There is a difference in the rights of those parties in this case, and I would like to have them state whether it is *my* both defendants or one.

401 (By Mr. C. S. Cox:) Perhaps this matter is so that we are getting a little bit confused as to all of it, but there is only one defendant here, and that is the Fidelity Trust Company as trustee. Wherever the Fidelity Trust Company is named, it is the Fidelity Trust Company, trustee of this property, and we move now, in behalf of the Fidelity Trust Company, Trustee, to strike out all of the testimony of Mr. Craig for the reason that the same is irrelevant

and immaterial, and therefore incompetent under the issues in this case.

(By the Court:) Let me see that complaint a moment. (Court examines paper.)

(By the Court:) The motion will be overruled under the allegations of the complaint, where he alleges the Fidelity Trust Company permitted this property to be wasted. I understand that is the object of the introduction of this evidence.

(By Mr. Rooker:) That is our theory, your Honor.

(By the Court:) The motion to strike out the evidence will be overruled.

To which ruling of the Court the defendant, by counsel, then and there took an exception.

402 Q. Are you acquainted with the farm in controversy in this case, known as the Rooker farm, just south of Nobles-ville?

A. I have never been over the farm much. I have been on the east side of the road, where the buildings are. I have never been on the west side, have been along the road and passed backward and forward there.

Q. The turn-pike runs about through the middle of the farm?

A. Something near that, I would say.

Q. So both sides of the farm are visible from the highway?

A. Yes.

Q. Were you acquainted with that farm in 1909?

A. Yes.

Q. Tell the Court what kind of farm it was, describe it, how it was carried on?

A. Well, at that time it was in good shape, better shape than it is at the present time, as far as fences kept up better, trimmed up better than it is now; at the present time the bushes have got pretty good control, especially along the road.

Q. What about the present state of fences and buildings?

A. Well, the fences have gone down, and the buildings. I could not say as to that, I have not been to the barn for—Oh, four or five years, something like that.

Q. You may tell the Court whether or not the fencing on the farm is such as to turn stock?

A. I would think not.

The defendant, by counsel, objects to the question for the reason it calls for a conclusion.

403 Q. Well, describe the fences?

(By the Court:) He said it don't turn stock; that may remain in.

Q. Mr. Beals, I will ask you to tell the Court if you are acquainted with the values of farms in this locality?

A. Well, I would not think I would be, now.

Q. Are you acquainted with the effect of depreciation on farm values, depreciation of farm on farm values?

A. Why, to some extent, yes.

Q. I will ask you to tell the Court what, in your opinion, would be the reasonable difference in value of the Rooker farm at this time, if the fences were up, and it was in a condition which you have described it to be, in general, in 1909, as compared with its present state?

The defendant, by counsel, objects, your Honor, this is not the proper way to get at this.

The Court sustained the objection of the defendant, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Q. Do you know the value of that land in 1909, Mr. Beals?

A. No, I don't; now I would have to compare it with some land that I bought on the river about that time, if I was to——

Q. Well, if you have any basis for your knowledge, you may tell.

By the Court:

Q. No, the question is, whether or not you are acquainted with the value of this farm in 1909, that is the question?

404 A. No, I could not say I would be.

Q. You may tell the Court, Mr. Beals, if you know, what it would reasonably be worth to replace the fencing and put the farm in tillable condition?

The defendant, by counsel, objects to the question.

The court sustained the objection of the defendant, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Cross-examination:

Questions by Mr. C. S. Cox:

Q. The residence on that farm was not completed in 1909, was it, Mr. Beals?

A. I think something near that time, it might have been a little later, I would not say.

Q. And Mr. Rooker was living there at that time?

A. Yes.

Q. And has lived there ever since?

A. Yes.

Q. Has been in possession of and directed the farming on the farm, is that not so?

The plaintiffs, by counsel, object to the question, your Honor, for the reason it is a question of law whether it was the Fidelity Trust Company or defendant.

405 The Court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

A. I would have to say I don't know who has been in control.
Q. But you have seen Rooker living there?
A. Oh, yes.
Q. Seen him around the farm at times?
A. Yes, I have saw him around there.
Q. You knew of nobody else who is superior in possession of the farm than Mr. Rooker, did you?
A. Well, I had not met any one else there.
Q. Did you ever see anything sold off of the farm?
A. How is that?
Q. Did you ever see or know of things being sold off of the farm, cattle, hogs, sheep, crops, or anything?
A. Well, I don't think I have ever saw any trading done there. I have went there a time or two with Mr. John Clark, a horse-buyer, but I don't think he bought anything.
Q. When you went there at those times with him—or did you say it was for the purpose of buying horses?
A. Yes.
Q. And who did you talk to with reference to that?
A. Mr. Rooker.
Q. And did Rooker claim to be the owner of the horses, have the sale of them?
A. Well, he seemed to have the sale of them.

And further the witness saith not.

406 W. J. WHITESELL, witness called for plaintiffs, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. Wm. V. Rooker:

Q. Tell the court your name.
A. W. J. Whitesell.
Q. And where do you live, Mr. Whitesell?
A. Noblesville.
Q. Are you acquainted with the Rooker farm, being the farm in controversy in this suit, and lying south of Noblesville?
A. Yes, sir.
Q. Are you a landowner yourself in that neighborhood?
A. Yes.
Q. How long have you been interested in land down there?
A. Since 1912.
Q. That was on the death of your father?
A. Yes, sir. I heired the land there.
Q. Had you ever lived on your father's place?
A. Yes.
Q. How many years have you known the Rooker farm?
A. Since '95, 1895.

Q. Were you acquainted with the values of farm lands in that locality, in 1909?

407 A. Yes, sir.

Q. Do you think you could tell the Court the value of the Rooker farm at that time?

A. I think so.

Q. What was it worth?

A. I should think it would be worth one hundred and fifty or forty-five dollars an acre, one hundred and forty-five or fifty.

Q. Was that with or without improvements?

A. With the improvements on it.

Q. What is the present value of farms in that locality?

A. Not over one hundred and thirty-five or forty.

By the Court:

Q. That is the present value of farms?

A. No, I understood him to say about that farm.

By Mr. T. E. Kane:

Q. He is asking about other farms?

A. I misunderstood him.

Q. Concerning the Rooker farm?

A. Yes, that is what I understood you to say.

(By Mr. Cox:) If it is concerning this particular farm, I move to strike it out. This man must show he is a competent witness to testify to the values generally.

(By the Court:) It may go out.

(By Mr. Cox:) And then the proper way, if it is competent at all by proving the value then and the value now.

(By Mr. Rooker:) That would then bring in whether it is in salable condition.

408 Q. Well, I will ask you what information, Mr. Whitesell you have as to value of farms in that locality?

A. There has been farms sold there close by, and sold——

The defendant, by counsel, objects to all this testimony.

The Court sustained the objection of the defendant to that question, and ordered the answer stricken from the record; to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

Q. You may tell the Court if you are acquainted with the value of the Rooker farm at this time?

The defendant, by counsel, objects, if the Court please; this witness has not shown his competency to testify to the values there.

The Court sustained the objection of the defendant, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Q. This farm that you speak of as your father's farm, lies in which direction with respect to the Rooker farm?

A. South.

Q. And do you know of land—sales of farms made in that locality in the last few years?

A. Yes.

Q. How many, Mr. Whitesell, to your knowledge?

A. I know of three.

Q. And how close were they to the Rooker farm?

409 A. Well, one of them was a quarter of a mile south, and the other was probably a mile and half south.

(By the Court:) Ask the witness this question, if I must tell you; ask if he thinks he is acquainted with the fair cash value of farm land in that community.

Q. You may tell the Court if you are acquainted with the fair cash value of farms in that locality?

A. I think I am.

Q. And you may tell the Court what is the fair cash value of the Rooker farm at this time?

A. One hundred and forty-five dollars an acre.

Q. And you may tell the Court, if you know, what the condition of the Rooker farm is at this time, with respect to its being in cultivation, or repair, or otherwise?

A. It is pretty badly run down, and practically no fences at all on it.

The defendant, by counsel, objects, that is a conclusion.

(By the Court:) It may stay in.

Q. And whether it is in cultivation this year?

A. No, sir.

Q. How long has this fencing been in its present state of bad condition?

The defendant, by counsel, objects he has not shown——

(By Mr. Rooker:) Strike out "of bad condition."

A. It has been gradually going down for, I don't know 410 how long, a good while.

Q. Now have you noticed at any time in the last few years, a portion of the crops on the farm not being gathered, the oats or other crops?

A. Why, last year is the only time I know of.

Q. I direct your attention, I don't know whether you were here at the time, in this community, Mr. Whitesell, about five or six years ago, — the oats crop on what is known as the Baker bottom?

A. No, I don't remem'er that.

Cross-examination.

Questions by Mr. C. S. Cox:

Q. Who was in possession of the farm in 1909, Mr. Whitesell?
A. Mr. Rooker.

The plaintiffs, by counsel, object for the reason that is calling for a conclusion.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Q. And has Mr. Rooker lived on the farm since 1909, up to the present time?
A. I think he has.
Q. And he has lived there with his family, has he?
A. Yes, sir.
Q. In the residence?
A. In the big house.
411 Q. The big house?
A. Yes, sir.
Q. And Mr. Rooker has been in charge of the farm down there during all this time, has he?
A. I think so: he rented it to a tenant. I suppose he had charge of it.
Q. He what?
A. He rented it to a tenant, that is, the farm land.
Q. And has he rented it to the same tenant, or different tenants?
A. He has had different tenants on there.
Q. But Mr. Rooker was around there from time to time?
A. Yes.
Q. Did Mr. Rooker have stock on the place himself?
A. Yes, sir.
Q. Did he sell the stock himself?
A. Yes.
Q. And fed it?
A. Yes.
Q. Fed it out of his share of the products. I suppose?
A. I suppose so.
Q. And did I understand you to say the crop this last year was not saved, not gathered?
A. No, sir, there is some down there now that is not gathered.
Q. And do you know why it was not gathered?
A. I do not.
Q. Do you know whether it was a good crop or not?
A. It was a fair crop for last year.
Q. Do you know who the tenant was last year?
412 A. I think Mr. Thomas Kane, I think, of Indianapolis.
Q. And do you know whether or not the crop was not gathered because Rooker and Kane had differences over it?
A. Only from hearsay, I don't know it for a fact.
Q. Do you know who cultivated the farm the year before?

A. Before that?
Q. Yes?
A. He had a tenant by the name of Johnson on the farm the year before.
Q. Who was Johnson?
A. John R. Johnson, or John E. Johnson.
Q. Was he there more than one year?
A. Just the one year.
Q. And who was there the year before that?
A. I don't know, but I think Rooker farmed it himself the year before.
Q. Farmed it himself?
A. I think so, but I would not say.
Q. And the year before that?
A. Rooker farmed it for quite a while, he hired help, but I don't remember how long it was.
Q. Did he have any other tenants between 1909 and last year, than Kane and Johnson, or did he tend the farm himself?
A. Well, I don't remember; he may have had a tenant there and I have forgotten it, I could not say for sure.
Q. Mr. Whitesell, in 1909, the residence building there, the big house, was not finished, was it?
A. Well, now, I could not say about that, whether it was or not. I know they were a good while building it, it is a big
413 house, and I could not say when it was finished.
Q. Do you know anything about there being a law suit between Kane and Rooker?
A. I do not.
Q. Mr. Whitesell, Mr. Rooker's wife, Dora E. Rooker, also lived there?
A. Yes, sir.
Q. In the home on the farm?
A. Yes, sir.
Q. If the Rooker farm had had good husbandry, good farming, during all of the time from 1909 to the present year, what would be its value at this time?
A. Well, I should think it would be from ten to fifteen dollars an acre, if in good repair.
Q. So the farm has depreciated some?
A. Yes.
Q. By reason of the man in possession letting it run down?

The plaintiffs, by counsel, object to the question as being a conclusion on his part.

The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there took an exception.

Q. When have you noticed the greatest difference, the greatest deterioration in the condition of the farm?
A. In the last four or five years.
Q. Part of that time Rooker himself was running it?

A. I think he ran it before Johnsen came, I would not say for sure.

And further the witness saith not.

414 M. A. GARRISON, witness called for plaintiffs, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. Wm. V. Rooker:

Q. You may tell the Court your name?
A. M. A. Garrison.
Q. Where do you reside?
A. Noblesville.
Q. What is your present occupation, Mr. Garrison?
A. Well, I might say I have no occupation now.
Q. What has been your life pursuit?
A. I have lived a retired life most of the time for the last two years.
Q. Prior to that, what were you engaged in?
A. Farming.
Q. How long have you been a farmer?
A. Oh, I farmed all my life, most.
Q. You are now retired and living here in the City?
A. Yes.
Q. In what part of the State have you been engaged in farming?
A. In the south part of the County, Delaware Township.
Q. And what kind of farming have you been doing in the years?

415 A. Well, general farming.

Q. Not a stock farm?
A. Yes, I had stock too, say part of the time.
Q. Did you have charge of any stock farms?
A. Yes.
Q. What?
A. I was on Mr. Hare's farm for about twelve or fourteen years had charge of that principally, well, rather through orders from him.
Q. That is the Mark L. Hare horse farm?
A. Yes, sir.
Q. And since then you have been farming on your own account?
A. Yes, sir.
Q. Are you acquainted with the farm in controversy in this suit, the Rooker farm?
A. Well, yes, I know of it, I know where it is located.
Q. How long have you known that farm?

(By Mr. Cox:) If the Court please, he has not said he knows the farm, he says he knows of it.

(By the Court:) Yes, you have got to qualify this man now.

Q. Have you seen the Rooker farm?

A. Yes.

Q. How frequently?

A. Oh, I have passed there quite often in the last, well, I might say, forty years, more or less, as business would call me back and forth past there.

Q. And in the forty years you have been passing that farm, you have observed the farm?

416 A. Yes.

Q. Now, Mr. Garrison, I want to direct your attention to about the year 1909, did you notice the farm about that time, about ten years ago?

A. Yes; no more then than I did other times I would be passing, general traveling of the roads I take notice to farm and the condition.

Q. Well, I will ask you to tell the Court what you saw in respect to the Rooker farm at that time?

(By Mr. C. S. Cox:) I take it this is all admitted by the Court under the statement Rooker made.

(By the Court:) Oh, yes.

A. Well, as well as I remember, the farm was in reasonable condition at that time.

Q. Well, just describe it as it appeared to you?

A. Well, in passing and re-passing there, I saw the stock over the farm, hogs, cattle, horses and sheep; and the fences were in reasonable condition, is my recollection, so as they could keep such stock about.

Q. Have you in the last few years noticed the farm?

A. Yes.

Q. And what, if you know, is its present condition?

A. Well, it is run down, we don't see no stock there, to speak of, any more than a couple of cows, I believe, and four or five or six head of horses, is about all I see in passing.

Q. And what as to the state of repair of fencing, if you noticed it?

417 A. Well, it don't look to me as though in condition that you could keep stock in very well, that is, stock with maybe a little range, or something like that; you could not keep hogs and sheep, as far as I can see from the road there.

Cross-examination.

Questions by Mr. C. S. Cox:

Q. Do you know who lived there in 1909 and run the place?

A. Why, I think Mr. Rooker has lived on the farm all this time that I spoke of.

Q. Do you know whether Mr. Rooker has rented the place to somebody else the last season or two?

A. Nothing only hearsay; I see men on the farm tilling it, and the like of that, and men living in some of his other houses.

And further the witness saith not.

418 JAMES WHEATLEY, witness called for plaintiffs, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. Wm. V. Rooker:

Q. You may tell the Court your name?
A. James Wheatley.
Q. Where do you reside, Mr. Wheatley?
A. Marion County, Castleton.
Q. And what is your business?
A. Farming.
Q. How long have you been a farmer?
A. All my life.
Q. What is your present age?
A. Sixty-four years old.
Q. Are you acquainted with the Rooker farm in Lawrence and Washington Townships, south of Castleton in Marion County?
A. Yes, sir.
Q. How long have you known that farm?
A. The last thirty years.
Q. How close do you live with respect to the Rooker farm?
A. About three-quarters of a mile.
Q. And with what frequency do you pass the Rooker farm?
A. How is that?
419 Q. With what frequency do you go by, or are in the immediate vicinity of the Rooker farm?
A. Oh, I am pretty near every day past there, and on the farm.
Q. You are the present tenant on that farm?
A. Yes.
Q. And been cultivating how many years?
A. I am hard of hearing, I can't hear you?
Q. How long have you been a tenant on that farm?
A. Three years.
Q. Mr. Wheatley, I will ask you to tell the Court about that farm in 1909, describe its condition, how it appeared to you?
A. In splendid condition at that time.
Q. Well, just tell the Court how it was, what buildings it had, if any?
A. Well, the buildings were all up in good shape, and fencing.
Q. How large a farm is it, Mr. Wheatley?
A. How?
Q. How large a farm is it?
A. Eighty acres.

Q. And how are the fields in that eighty acres divided up with respect to the fencing?

A. Well, two fields on the west side of the road in Washington Township, and one tillable field on the east side of the road, and woods pasture.

Q. Now, in which direction does the fence run on the east side of the road dividing the tillable land from the woods pasture, which direction does that fence run?

420 A. North and south.

Q. And across the forty?

A. Yes.

Q. And in which direction does that partition fence run dividing the west forty?

A. Which, you mean on the——

Q. The Washington Township part of it?

A. Well, it runs north and south.

Q. No, no, that partition fence?

A. Oh, east and west.

Q. So one part is divided north and south, and the other is divided east and west?

A. Yes.

Q. You may tell the Court what the present condition of the farm is in respect to its state of repair?

A. How is that?

Q. Tell the Court what the present condition of that farm is in respect to its state of repair?

A. Very poor.

Q. Well, tell the Court what you mean by that?

A. Well, there is no fencing at all on that hardly; you could not turn anything out on the farm, it would get all over it, the fences are down, and the barn is in bad repair, half of the roof is off of the barn and the cribs all down, the wind-pump down.

Q. What do you mean by the wind-pump being down?

A. It blowed over.

Q. And what do you mean by the cribs being down?

A. It blowed over.

Q. And when did the cribs blow over?

421 A. Two years ago this last May, the 1st day of May.

Q. What kind of cribs were they?

A. Double corn cribs shedded over, and granaries in the top loft; a pair of hay scales in the driveway.

Q. That building, you say, is down now?

A. That is all down, laying there rotting.

Q. Mr. Wheatley, I will ask you to tell the Court if you are acquainted with the reasonable renting capacity of that farm per year?

The defendant, by counsel, objects to question because it is wholly incompetent, irrelevant and immaterial.

The court sustained the objection of the defendant, to which

ruling of the court the plaintiffs, by counsel, then and there took an exception.

(By Mr. Rooker:) That farm, I wish to show, was idle part of the time.

(By the Court:) That would not make any difference, or a proper question, if idle all the time.

Q. What, Mr. Wheatley, if you know, was the fair cash rental value of that farm at this time?

The defendant, by counsel, objects to the question because he has not shown this witness is competent to testify as to the values.

The court sustained the objection of the defendant, to which ruling of the court the plaintiffs, by counsel, then and there
422 took an exception.

Q. Are you acquainted with rental values of farms in that locality?

A. Yes.

Q. Are you acquainted with the rental value of this farm, the Rooker farm?

A. At the present?

Q. Yes?

A. Well——

By the Court:

Q. Are you acquainted with it?

A. Yes.

Q. Well, tell the Court what its fair cash rental value is?

The defendant, by counsel, objects to that question, what has that got to do with this proposition, its fair rental value now; if you show the value of this place in 1909, and a different value now, that would be in accordance with the testimony you brought out in relation to the Hamilton County farm, but this does not reach that question.

The court sustained the objection of the defendant, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Q. Well, we will go back to 1909; you may tell the Court, if you know, what was the fair cash rental value of that farm in 1909?

A. Well, I don't know, I never rent for cash, hardly ever,
423 always grain rent; I could not say at that time; I know how other farms rents around.

Q. Well, what was the fair grain rental value at that time?

A. Well, generally grain rent, two hundred and fifty small grain and half the corn and half of the hay, if any.

Q. Well, now, you may tell the Court what that farm would fairly and ordinarily produce, if rented under such a contract as you have spoken of?

The defendant, by counsel, objects, if the Court please, to this question, it can not have anything to do with any issue in this case.

The Court sustained the objection of the defendant, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Q. Were you acquainted with the values of farm lands in that locality in 1909?

A. Yes, I know practically all of them.

Q. I will ask you to tell the Court, if you know, what was the reasonable cash value of the Rooker farm in 1909, per acre?

A. Well, I suppose it was worth six hundred dollars a year, six or seven hundred dollars a year.

The defendant, by counsel, moved the Court to strike from the record the answer, for the reason it is not responsive to the question.

The Court sustained the motion of the defendant to strike
424 out, and ordered the answer stricken from the record; to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Q. I am not asking about the rental value, but about the sale value, were you acquainted with the reasonable cash value?

A. No, I could not say.

Q. You don't know about that?

A. No.

Cross-examination.

Questions by Mr. C. S. Cox:

Q. You say you have rented that farm?

A. I can't understand you.

Q. You say you have rented that farm the past three years?

A. Yes, sir.

Q. And that it has run down the past three years?

A. Why, it is bound to go down if no repairs are put on it.

Q. You can answer my question, can you not?

A. Yes.

(By Mr. Cox:) Read him the question.

(Question read.)

A. In what way?

Q. You testified to that, didn't you, that the buildings have gone down?

A. Yes.

Q. And that the fences have gone down?

A. Yes.

Q. You have been the tenant during that time, have you not?

425 A. Yes.

Q. Who did you rent from?
A. Mr. Rooker.
Q. You didn't do anything to keep up the fences?
A. Why, I helped to keep up part of the fences to save my crops, part of the time.
Q. And Rooker didn't do anything to keep up the fences?
A. He did, he furnished me some wire.
Q. Well, that is all?
A. On the east forty, west forty between Harmon Brunson and Rooker.
Q. You never made demand on anybody else to keep up the fences and buildings?
A. I didn't know anything about that at all.
Q. Mr. Rooker claimed to be the owner of it, didn't he?
A. I suppose so.
Q. And rented it to you?
A. He rented it to me.
Q. Did you have a rental lease?
A. Yes.
Q. Have you got a copy of it with you?
A. I have.
Q. Let's see it?
A. I have not got it with me.
Q. I asked you, I understood you to say you did?
A. No, I have not got it with me.
Q. When did you rent of Rooker first, Mr. Wheatley?
A. Well, in '16.
Q. Cash or grain rent?
A. Grain rent.
426 Q. When did your tenancy begin, what time in the year?
A. The first of March; no, in the fall.
Q. The first of September?
A. Yes; is that not right, Will?
Q. I am asking you?
A. I may be mistaken, I won't say positive.
Q. Was that the first of September '15 or '16?
A. Sixteen.
Q. The first of September?
A. No, I am wrong myself, wait until I get right and I will tell you.
Q. That is what we want to know?
A. 1916, in the spring.
Q. In the spring of 1916?
A. Yes.
Q. And you didn't put in wheat in that year?
A. Not until this last fall.
Q. And your tenancy was for—your first tenancy was for the year beginning the first of March, 1916?
A. Yes, sir.
Q. Then did you lease again?
A. Yes, sir.

Q. For the year beginning the first of March, 1917?
A. Yes.
Q. And then did you take a new lease the first of March, 1918?
A. Yes, I rent of Mr. Rooker by the year, every year he renews our articles.
Q. During these three years your leases provided for grain rent, did they?
427 A. Yes.
Q. Now the crops for your first yearly tenancy, what did you do with Mr. Rooker's part?
A. I put it in the crib in the barn, up in the hay loft.
Q. What became of it?
A. I suppose he sold it.
Q. Well, was it taken away?
A. Yes, sir.
Q. Who took it away?
A. I carted the corn to Castleton for him.
Q. For him?
A. Yes.
Q. Did you collect the money?
A. No, sir, I took him the weight tickets.
Q. And turned them over to him?
A. Turned them to him.
Q. Now the second crop, what became of Rooker's part of that crop?
A. Well, the same way.
Q. And what was the nature of the first crop that you turned over to Mr. Rooker?
A. Is what?
Q. What kind of crops was it?
A. Corn and oats.
Q. Some hay?
A. No hay.
Q. How much oats were there the first year?
A. Six hundred and some odd bushels.
Q. And what did you get for the oats?
A. Well, I don't know what he got for his oats?
428 Q. You knew what they were selling for at the time you hauled them?
A. I didn't sell the oats.
Q. How much corn?
A. Well, about seven or eight hundred bushels of corn.
Q. Now, the second year, was it corn or oats, or both?
A. The same.
Q. How many bushels of oats the second year?
A. Eight or nine hundred.
Q. And how many bushels of corn the second year?
A. Well, I could not say.
Q. You have some idea?
A. No, there was not as much as there was the first year, something near five hundred bushels, I reckon.

Q. That was all, was it, of the crop that went to Mr. Rooker the first two years?
A. Yes.
Q. Now you put in wheat last year?
A. Yes.
Q. Was that the first time you put in wheat?
A. Yes, sir.
Q. Have you had that wheat thrashed?
A. Yes, sir.
Q. What became of Mr. Rooker's share of that wheat?
A. I hauled it to the elevator.
Q. When?
A. This fall, just about two weeks ago.
Q. And how much of it was there?
A. Well, there was something over six hundred bushels, six hundred and five bushels, I think, that is, altogether, now, not
429 his part.
Q. I am asking you about his part, how much was his part?
A. Well, I don't remember, I taken his tickets to him, and everything.
Q. What was the relative proportion coming to him and to you of the six hundred and some odd bushels?
A. Well, he got the two-fifths.
Q. How many acres of wheat did you have?
A. About nineteen acres.
Q. It made something over thirty bushels to the acre?
A. A little bit.
Q. How much corn have you got out this year?
A. About twenty-two acres.
Q. Have you got any other crops out this year?
A. No, sir; yes, some oats.
Q. You thrashed the oats, did you?
A. No, not yet, the oats are not thrashed.
Q. Well, in shock?
A. Yes, sir.
Q. How many acres of oats?
A. About nineteen acres.
Q. And what sort of crop of oats do you think you had?
A. Well, I can't say, the oats won't be nothing like they have been on the farm, they are light.
Q. The soil, the condition of the soil on that farm has not deteriorated since you have been farming it?
A. Some.
Q. Why?
A. Because it has not clovered.
Q. Why has it not been clovered?
430 A. Well, I don't know; we intend to sow it this fall and spring.
Q. Trying to get all out of it you skinned it?
A. That is none of my business.

Q. Who directed you about what you should put out?
A. Well, I rented the ground, and we were to have corn and wheat and oats and such as that.
Q. No provision in your lease for clovering at any time?
A. One time.
Q. When?
A. The pursuing year.
Q. That is, you skinned it for three years without any clover at all, is that right?
A. Yes.
Q. What is the condition of your corn crop that you have got in this year?
A. Well, just now the corn crop, of course, the frost hurt the corn we had hard; it would have been better if it had not been for that.
Q. That is high ground up there, is it not?
A. Some of it is and some is not.
Q. Before you rented this farm, were you acquainted with the farm?
A. Yes, sir.
Q. Who was on it before then?
A. Well, I think the farm laid idle a couple of years before ever I rented it; I know it did.
Q. Do you know anything about anybody by the name of Duffy farming the place?
A. Yes.
431 Q. When did he farm it?
A. Well, Mr. Duffy farmed it, I think a man farmed it after him, but I can't tell you who it is, after Mr. Duffy, but I can't tell you to save my soul, he is a German man.
Q. When did the wind-pump blow down?
A. Well, about a year ago, I think as near as I can tell you.
Q. You informed Mr. Rooker that it was down?
A. Yes, sir; Oh, informed him?
Q. Ever tell him?
A. No, sir, I hitched the team to it and pulled it off to one side.
Q. Did you tell Rooker?
A. I did afterwards, yes.
Q. How long afterward?
A. Well, not very long, I don't just remember.
Q. When did the cribs blow down?
A. Two years ago this last May.
Q. Did you tell him about them being down?
A. Yes, sir.
Q. What did he say to you about it?
A. Well, I don't remember it.
Q. He didn't offer to take any of the money from the crops and put them up?
A. He didn't say anything about it, much.
Q. Did he put up the pump?
A. How?

Q. He didn't offer to take any of the money from the crops and put up the pump or cribs?

432 A. There was nothing said about that.

Q. Now, as a matter of fact, didn't he say to you, "why this land don't belong to me, it belongs to the Fidelity Trust Company, and you had better go down and notify them to put up these cribs and pump?"

A. Who said that?

Q. I say, didn't he tell you that?

A. No, sir, he didn't.

Q. He claimed all the time that the farm belonged to him, did he?

A. I suppose so, we didn't talk that over.

Q. How?

A. We never had no such conversation at all, we never talked such things as that over.

Q. Well, he described himself as the owner in the lease he made to you?

A. How?

Q. He described himself as the owner in the lease he made to you, didn't he?

A. Yes, I think he did.

Q. That is, he and his wife together?

A. And I don't know any better today, but what it does belong to him.

Q. That is, to William V. and Dora E. Rooker?

A. William V. Rooker.

Q. Didn't his wife—wasn't she claiming an interest in it too?

A. Who.

Q. Mr. Rooker's wife, Dora E.?

A. In the farm, you mean?

433 Q. Yes?

A. I could not say anything about that.

Q. You dealt with him entirely?

A. Yes, sir.

Redirect examination.

Questions by Mr. W. V. Rooker:

Q. They have asked you about renting this farm, your contract was in writng?

A. Yes, sir.

Q. And always has been in writing?

A. Always have been.

Q. The original contract that you first made is the one you are there under now?

A. Yes, sir.

Q. Except it has been noted on the margin "extension?"

A. Yes.

Q. Now, how long was the last extension for?

A. Now, my time on the farm yet?

Q. Yes, the last extension?
A. Nineteen hundred twenty.
Q. Well, how long was the last extension; has there been any extension made this year?
A. No.
Q. The extension was made last year and for how many years?
A. Until 1920.
Q. Two years?
A. Yes, take 1920 is my time, I should say.

434 Q. You were asked about the clover, you may tell the court whether or not, at the time the lease was last extended, there was provision made in the extension that you should sow clover?
A. Sow clover.
Q. And you were to have sown that clover last spring?
A. Yes.
Q. And unable to do it?
A. Yes.
Q. But you have arranged to sow the clover this fall or next spring?
A. Next spring, that is right.
Q. Now, in respect to skinning the farm these three years, will you tell the Court how much money that eighteen acres of wheat realized?
A. Something over twelve hundred dollars.
Q. And you may tell the court as to the character of that soil for producing the crops?
A. Well, I call it pretty good soil.
Q. Well, you may tell the Court whether or not you ever took any corn prizes over corn raised on that farm?
A. There has been good crops of corn raised there.
Q. Just answer my question, whether you ever took any corn prizes for corn raised on that farm?
A. A little louder.

By Mr. Cox:

Q. Whether you took any corn prize.

(By the Court:) I don't care whether he did or not.

The plaintiffs, by counsel, then withdrew the question.

435 Q. Now, you say that you had to erect fencing, or repair fencing to keep the stock from destroying your crops?
A. Yes.
Q. And how often have you had to go over that fencing, to keep the stock from destroying your crops?
A. Several times.
Q. You say I helped you in that, by furnishing the wire?
A. Yes.

Q. And your present tenancy on that farm began a year ago and ends in the winter of next year?

(No answer.)

And further the witness saith not.

W. C. OREN, witness called for plaintiffs, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. W. V. Rooker:

436 Q. Tell the court your name?
A. W. C. Oren.
Q. Where do you reside?
A. Marion County.
Q. Are you acquainted with the Rooker farm down in Washington and Lawrence Township, south of Castleton?
A. Yes.
Q. How long have you know- that farm?
A. Why, five years this last spring.
Q. And how close do you live to that farm?
A. I live half a mile north, now.
Q. Did you at any time live on the adjoining farm?
A. Yes.
Q. When was that?
A. The last five years, up until last December.
Q. You may tell the Court if, during the five years, you have known this farm?
A. Yes.
Q. State whether it was at any time idle?
A. Yes, there was one year it was idle.
Q. Are you acquainted with the present state of repair of the buildings and fences on the farm?
A. Well, I think I am, yes, sir.
Q. Tell the Court about it?
A. Well, there is practically no fences, no fences that will hold any stock, and the cribs are down, of course; as far as paint is concerned, they could use lots of it.
Q. How about the roof on the barn?
A. Well, I don't know as to that.
Q. Are you acquainted with the reasonable value, or worth,
437 of constructing fencing, such as was on that farm?
A. No, sir.
Q. You don't know about that?
A. No, sir.

Cross-examination.

Questions by Mr. C. S. Cox:

Q. You say the was idle one year?
A. Yes, sir.
Q. When was that, Mr. Oren?
A. The year before Mr. Wheatley moved there, or before he rented it; let's see, that would be——
Q. Four years ago?
A. It was idle in 1915.
Q. Do you know who had it before that?
A. A man by the name of John Vanderwall.
Q. How long was he there?
A. One year.
Q. What did he raise on the place, do you know?
A. Well, he had out corn, some oats, and I think some millet; I don't know just what all now.
Q. And who was there before Vanderwall?
A. Why, Duffy.
Q. Luke Duffy, was it?
A. Yes.
Q. State Highway man, is that the fellow?
A. That is the man.
Q. How long was he on the place?
A. One year.
438 Q. Was he a farmer?
A. No, sir.
Q. What did he do on the place?
A. Well, he had a hand there all the time, he didn't do any work.
Q. Did they raise anything that year?
A. Yes, sir, they had corn, I think the whole thing in corn.
Q. Was the hand a real farmer, or like Duffy?
A. He was like Duffy.
Q. Who was there before that?
A. I don't know; that is as far as I know back.
Q. Do you know anything about a wind-pump being on the place?
A. Yes, sir.
Q. Do you know when it blew down?
A. No, I don't; I know it is down now, is all.
Q. Had it been used before it blew down?
A. No, I don't think they ever used it to pump water, not in my time.
Q. And old thing out of shape?
A. No, sir, as far as the wind power was concerned, it was all right, but there was no connection for pumping, no pump that you could use the wind power on.
Q. When was it the crib blew down?
A. Oh, I don't know, a couple of years ago, I guess.

Q. No effort was made to straighten it up?
A. I think not.
Q. Did you ever see Rooker or his wife about the place?
A. Not to know it was them, no, sir.

439 Redirect examination.

Questions by Mr. W. V. Rooker:

Q. Mr. Oren, Judge Cox asked you about this farm being idle when Mr. Duffy came out, did you help him do any breaking?
A. Yes, sir.
Q. Do you know whether the farm was idle also the year before he came?
A. I would think it was.
Q. Tell the Court what condition you found it in when you helped Mr. Duffy do breaking?
A. There was weeds there we had to cut down and dig them up before we could do any breaking.
Q. That was in the fields you helped cultivate?
A. Yes, sir, I helped him two or three days, I don't remember just how long.
Q. You say you knew the farm when Mr. Vanderwall was there?
A. Yes, sir.
Q. Mr. Vanderwall had it all in corn?
A. No, I think not all of it.
Q. He had some millet and oats in?
A. Yes.
Q. And you don't know what he did with the crops?
A. No, sir.
Q. You don't know what Mr. Duffy did with the crops?
A. No, sir.
Q. Was Mr. Vanderwall a farmer?
A. I think not.
Q. You think not?
440 A. No, sir.
Q. He put in his time principally taking pictures all over Fort Harrison and the roads leading to it?
A. I don't know where he put his time in, he didn't hurt himself working.
Q. He was a German linguist?
A. He spoke several languages.

And further the witness saith not.

Court adjourned until one o'clock P. M.

H. L. BRUNSON, witness called for plaintiffs, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. W. V. Rooker:

Q. State your name to the Court?
A. H. L. Brunson.
Q. Where do you reside, Mr. Brunson?
A. Washington Township, Marion County.
Q. And what is your business?
A. General farming.
Q. How long have you been a farmer?
A. Practically all my life.
Q. About how old are you now?
A. Fifty-one.
Q. Are you acquainted with what is known as the Rooker farm southwest of Castleton, on the township line road between Lawrence and Washington Townships?
A. I am.
Q. Have you any land adjoining it?
A. I have.
Q. And how long have you been farming in that locality?
A. Practically all my life.
Q. And you have known this Rooker farm how many years?
A. Ever since I can remember anything.
Q. Mr. Brunson, I wish to direct your attention to the farm and its condition about the year 1909, and you may describe the farm to the Court as it then appeared to you?
A. Well, the farm was in fair condition then, good improvements; I mean in regard to fences; the buildings looked good, I never examined them.
Q. You join the farm on the west side, I believe?
A. Yes, sir.
Q. Now, since 1909, you may tell the court if you have noticed any change in the appearance of the farm; if so, what that change is?
A. Well, I have noticed the fences, in particular, have been neglected.
Q. And have you noticed about the buildings?
A. Well, I noticed one building is down, the corn crib.
Q. What is the present condition of the fences on that farm?
A. Well, joining me there is none, practically speaking.
Q. And when, if you remember, did those fences between you and the Rooker farm get in such state of disorder as they are now in?
A. Well, they have been going from bad to worse in the last twelve years, that is about as long as I have owned land adjoining.
Q. Have you ever had any occasion to have the partition fence between us repaired, or overhauled?

A. I have.

Q. When was that, if you remember?

A. I don't remember how long, but possibly four or five or six years ago.

Q. And did you have—did you go to see the Fidelity Trust Company on that occasion?

A. Yes, I did.

Q. Where did you go to find them?

A. Well, it was on Market Street, Indianapolis, I believe.

Q. And did you see anybody there?

A. Yes, sir.

Q. Well, did you make known the purpose of your going?

A. I went there to inquire for the President of the Company, and some man, they didn't tell me his name, said he was out of the City; he asked what he could do for me; I told him what my business was in regard to the fence.

443

Q. Well, what did he say, if anything?

A. Well, he laughed and said he didn't know whether they owned that, or somebody else.

Q. Well, what did you tell him you wanted to do about the fence?

A. I told him I wanted the fence so I could keep my stock out of the land adjoining, we had in pasture, and my stock was in there two or three times a week.

Q. Well, as a result of that visit, or any other effort you made, did the Fidelity Trust Company furnish any material or otherwise assist in repairing the fence?

A. Not to my knowledge.

Q. Mr. Brunson, have you noticed that farm idle?

A. Yes, sir.

Q. Do you remember how many years it stood idle?

A. I could not say positive, but I think two years.

Q. And what, if anything, do you know of crops lying put in it in the spring and not harvested?

A. Well, I think I remember one field that was in oats, that was not harvested.

Q. Do you remember what year that was?

A. No, sir, I could not say, that has been four or five years ago, maybe longer, I don't know.

Cross-examination.

Questions by Mr. Henry Seyfried:

Q. Mr. Brunson, you live right adjoining this farm, next door neighbor?

444

A. Yes, sir.

Q. And you have known the farm all your life, that is, as far back as you can recall?

A. Yes, sir.

Q. And you say the farm has been going back for the last twelve years?

A. I said in regard to fences.

Q. In regard to fences, yes; that is, from year to year during the last twelve years the fences have grown worse, that is what you mean?

A. Yes.

Q. So beginning twelve years ago they already demanded attention?

A. Sir?

Q. So beginning twelve years ago they demanded attention by way of repairs?

A. Well, I judge something like that.

Q. Now you know he has lived there, don't you?

A. Well, just only in one——

Q. Mr. Rooker and his wife lived there?

A. No, sir.

Q. Never did?

A. Not to my knowledge.

Q. Did Mr. Rooker and his wife manage the farm through tenants during your acquaintance with it?

A. I could not say as to that.

Q. But it was tenanted and cultivated?

A. How?

Q. I say it was in the hands of a tenant and cultivated?

A. Yes, sir, part of the time.

445 Q. And one time you remember it not being, one or two years?

A. Possibly three, I won't say positively.

Q. And did you see Mr. Rooker or Mrs. Rooker about the place in the last years?

A. No, sir, I don't think I ever saw either of them on the farm.

Q. Either of them on the farm; and the farm out in that neighborhood, as far as your knowledge is concerned, is known as the Rooker farm?

A. How?

Q. I say, it is known to you and the people out there as the Rooker farm?

A. Yes, principally.

Q. And the people that occupied it, do you know who put them in possession?

A. No, sir.

Q. Do you know to whom they accounted for the rental of the property?

A. No, sir.

Q. Now for the year that the crop was not harvested, who was there in possession?

A. I don't believe there was any one living in the house, I am not positive, but I don't think there was.

Q. Who was the tenant cultivating the land?

A. I don't know.

Q. You don't know his name?

A. No, sir, it was cultivated one or two or three years since I have known it that I didn't know the parties who did the work, I would see them pass the road and that is all.

446 Q. But they were cultivated by some one, under some one?
A. In a way, yes, sir.
Q. Now who told you to go to the Trust Company, Mr. Brunson?
A. No one told me to; I had heard rumors that it belonged to the Trust Company?
Q. And you went there in pursuance to that rumor?
A. Yes.
Q. And did you ever go to Rooker about the fence?
A. I wrote him a letter.
Q. What did he tell you in answer?
A. He has not told me anything.
Q. Did he answer your letter that you wrote him?
A. No, sir.
Q. Did you ever talk to him personally about it?
A. No, sir.
Q. And the man at the Trust Company told you he didn't know whether they owned it or some one else?
A. Yes, that is about the words.
Q. Did he tell you he didn't know whether they or Rooker, and that Rooker claimed he owned it?
A. He didn't make any claim; said he didn't know whether they owned it or not.
Q. Did he tell you the matter was in dispute, or litigation?
A. He said they were in trouble.
Q. Did he tell you where?
A. No, sir, he didn't.
Q. Now you talked about the property being in bad—in a state of disorder, part of it, you mean principally the fences?
447 A. That is what I noticed most.
Q. For the last three years there has been some one cultivating the land and * * *
A. I don't understand that?
Q. For the last three years about, there has been some one in possession of the property and cultivating the farm?
A. There has been a man cultivating it and part of the time been a man living in the house.
Q. Mr. Wheatley?
A. No, sir, he never did live in the house.
Q. Mr. Wheatley never did?
A. No, sir.
Q. Mr. Wheatley has charge of it?
A. I think he has.
Q. Who else did you know to be in charge, by name?
A. Mr. Duffy.
Q. Who else, Vanderwall, or some name of that kind?
A. Yes.
Q. Who else?
A. That is all I know.
Q. Well, before that time who was cultivating it, Mr. Rooker himself?
A. No, sir, I could not answer who they were?

Q. But there were people in charge?
A. Part of the time, yes, sir.
Q. And somebody in charge of the farm the time the oats were not harvested, were there not?
A. I am not positive, I think the oats were sown in the spring, but I don't know whether any other crops were out or not.
448 Q. Do you know whether Rooker and the man got into a law suit?
A. No, sir, I don't know about it.
Q. Was that about the time Duffey was in, that the crop of oats was not harvested?
A. I think it was before he was there, I am not sure.
Q. Now Mr. Wheatley has been there about three years, has he not, this is the third year?
A. No, I don't: to the best of my recollection I think this is his second year, I am not sure, I don't know.
Q. And this Vanderwall, or what his name is, he was there a year or so?
A. He was there almost a year.
Q. And Duffy was there ahead of him?
A. I would not say whether he was there before or after.
Q. Well, the oats—the time the oats were not harvested was either the time Duffy or Vanderwall were in possession?
A. No, sir, it was not when either one of them were farming it.
Q. You don't know the name of the fellow?
A. No, sir, I don't know who put them out.
Q. But there had been a man working and cultivating, but he didn't take in the oats, is that right?
A. That is correct.
Q. Did you ever have any talk with Rooker or his wife about who owned the farm?
A. I never did, no, sir.
Q. Did he ever talk to you?
A. No, sir, I don't see Mr. Rooker once in six or seven
449 years.
Q. How many acres do you own?
A. My wife and I together have eighty acres.
Q. Just joining this section to the west there?
A. Yes, sir.

And further the witness saith not.

JOSEPH W. RINKARD, witness called for plaintiffs, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. W. V. Rooker:

Q. You may state your name to the Court, please?
A. Rinkard.

Q. Where do you live?
A. Washington Township, Marion County.
450 Q. What is your business?
A. Farming.
Q. How long have you been farming, Joseph?
A. Why about all my life.
Q. You are a man of what age?
A. Sixty-three this fall.
Q. Sixty-three?
A. Yes.
Q. Are you acquainted with the Rooker farm that is south of Castleton on the Township line?
A. Yes, sir.
Q. How long have you known that farm?
A. About forty-five years.
Q. How far do you live from that farm?
A. Well, I am just a mile from the south line of that farm.
Q. To your house?
A. Yes.
Q. You have passed that farm frequently during the past years?
A. Once a week almost always.
Q. I will ask you, Mr. Rinkard, if you noticed the condition of the farm along about 1909, with respect to its fencing and improvements, and state of repair?
A. Well, yes, I took a little notice of it.
Q. Tell the Court how it appeared to you?
A. Well, there was gates there.

(By Mr. C. S. Cox:)

Q. What?
A. Gates on the farm, the fences were down some, and the crib is down.
Q. No, I am talking about 1909?
451 A. Oh, well—well, there was gates to the fences then.
Q. Nine or ten years ago what shape was it in?
A. Well, eleven years ago I used to feed your stock there, it was in pretty good shape then.
Q. Well, describe how the farm was?

(By Mr. Seyfried:) You are talking about the Hamilton County or Marion County land?
(By Mr. Rooker:) Marion.

Q. I want you to talk about the farm down below your house, in Marion County?
A. Yes, well, at that time there was gates there at the fences and there is not now; and the fences was in pretty fair shape then, along the road, the outside fences, I don't know how they were.
Q. Do you remember when those fences were built?
A. Yes, a good while ago, I helped build one fence.

Q. Was it built after the road was straightened?
A. Sir?
Q. Was it built after the road was straightened?
A. Yes, but I didn't help build the fence along the road: I helped build the partition fence between you and Mr. Lovell.
Q. Well, how were the buildings in 1909?

By Mr. C. S. Cox:

Q. When was the road straightened?
A. The fence was built——
Q. And how were the buildings in 1909?
A. Well, they were in pretty fair shape then.
Q. Do you know how large the barn is on that farm?
A. No, I don't know, exactly.
152 Q. Do you know how many horses it holds, or mules?
A. Oh, I forgot; I used to know, but I have forgotten.
Q. Do you know what the capacity of the cribs, the granary, were?
A. No, I don't know.
Q. There was a scale house also?
A. Yes, sir.
Q. And it was a part of the crib, the granary?
A. Yes, a crib on each side of the scales.
Q. And is that building that is down now?
A. Yes.
Q. Did you notice that farm standing idle any years, Mr. Rinkard?
A. Yes, it was idle awhile.
Q. Do you remember how many years it stood idle?
A. Well, I know of two years, but I don't know whether any more or not.
Q. None of the fields cultivated, and nobody living on the farm at that time?
A. No, sir.
Q. Do you know what years those were?
A. No, I could not tell you.
Q. What is your best impression?
A. Well, it would just be guess work with me, what year it was, because I didn't pay any attention to it.
Q. Well, the last three or four or five years, something like that?
A. Oh, I think it was before that, it has been five I know, Wheatley has had it three years, this will be his third year.
153 Q. How long was it before Mr. Wheatley went there that the farm was idle, if you can tell?
A. Well, I could not tell you just exactly what year that was it was idle.

Cross-examination.

Questions by Mr. Henry Seyfried:

Q. Mr. Rinkard, you have lived out there for a number of years?
A. Yes, sir.
Q. And you own this place?
A. Yes, sir.
Q. And you helped build the partition fences?
A. I did between the Leatherman and that place.
Q. How many years ago?
A. Well, it has been several years ago.
Q. Well, how many, twenty?
A. No, it has been about fourteen or fifteen years ago.
Q. Fourteen or fifteen?
A. Since I helped build that fence.
Q. And the fence along the road was built when the road was straightened, was it?
A. Well, I could not say for that.
Q. Do you know when the road was straightened?
A. Yes, but I don't know ——
Q. How many years back, how many years back?
A. I could not tell you.
Q. Fifteen, twelve?
A. Must be twenty, I judge.
454 Q. So if the fence was built when the road was straightened it was twenty years ago?
A. I would think so.
Q. At least that much, is that right?
A. How?
Q. I say at least twenty years ago?
A. Why, that is about the time I think the road was straightened, and I recall of that building the fence, but I can't tell you just exactly what year.
Q. And now there are no gates at the fences where there had been?
A. No, sir, there is not.
Q. And in 1909 you said the fences were only in fair condition?
A. Yes.
Q. They were already going down at that time, were they not?
A. No, I didn't say they were.
Q. How?
A. They turned stock then all right.
Q. Yes, but they were only in fair condition, they were not new and first-class, just fair?
A. Well, I would call them pretty good fences around it then.
Q. Pretty good fences at that time?
A. Yes, sir.
Q. And the crib and whatever other buildings there is now, that you spoke of being down, was blown down by the wind?
A. No, sir, I made inquiry about that; it went down when there

was no wind, that is the first building I ever saw go down when there was no wind.

455 Q. You inquired about it, and it just fell down?

A. Yes, fell down.

Q. Had it been worn out, was it wore out?

A. No, not since he built that crib, since he built his barn.

Q. And you know of the farm being idle a season or two?

A. Yes, two years as near as I can get at it.

Q. And you also know of the farm being occupied by Mr. Rooker's tenants in other years, don't you?

A. Yes, sir.

Q. Was Mr. Rooker out there?

A. Why, I have not saw him the last five or six years to amount to anything.

Q. And these men that were in charge of the farm, do you know who put them in possession, Mr. Rinkard?

A. No, sir, I do not.

Q. Mr. Rooker always claimed to you to be the owner of the farm, he and his wife?

A. Yes, he did at that time.

Q. And when did you last talk to him about the farm?

A. Well, I don't know that I ever talked to him about the farm.

And further the witness saith not.

456 J. S. SHANNON, witness called for plaintiffs, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. W. V. Rooker:

Q. You may tell the Court your name?

A. J. S. Shannon.

Q. Where do you live?

A. Noblesville.

Q. What is your business, Mr. Shannon?

A. Civil engineering.

Q. Do you hold any official position in this County?

A. County Surveyor.

Q. Are you acquainted with the Rooker farm south of town, in Noblesville Township.

A. Yes, sir.

Q. Mr. Shannon, I want to have you tell the Court, if you can, about the lineal extent of farm fencing on that place?

A. Well, that would be pretty hard to tell the course of the fences, I might give you an idea of the boundary lines.

Q. Well, do that, give us the best information you have about it?

457 A. This farm is bounded on the west mainly by White River, and on the east by the Lake Erie Railroad, and the distance given on our field notes, as I could get them, amounts to about sixteen hundred and fifty rods around the farm.

Q. That is your dimension along the railroad?
A. No, that is the whole outside dimensions.
Q. Sixteen hundred?
A. Yes, sixteen hundred and fifty.

By Mr. T. E. Kane:

Q. Sixteen hundred and fifty rods?
A. Yes.
Q. Now the farm is split by the Indianapolis Pike, is it not?
A. Wait a minute, that includes—change that other question, it is eleven hundred and seventy rods around the farm.

By Mr. T. E. Kane:

Q. Eleven hundred and seventy?
A. Yes, and there is two hundred and seventy-three rods of the road.
Q. Now, is that the road on one side, the lineal length on one side of the road, or both sides?
A. One side.
Q. One side of the road; now, was the farm divided in fields, was it or not?
A. Yes, I think there are some division fence there. I am not particularly acquainted with the division of the farm.
Q. Do you know how far it is from the railroad across to the pike at the place where the range crosses the pike, where the fence was?
Q. Holding the range line between the railroad?
458 Q. Yes, between the railroad and the range line?
A. Well, that is about eighty-one rods.
Q. Well, there was a fence there, was there not?
A. Fence north and south.
Q. East and west from the pike across to the railroad?
A. I don't know just which position you mean, the extreme south end?
Q. Both on the south end of the farm and up north of the brick house, about the middle of the farm?
A. I could not say as to the fences across north of the brick house.
Q. Do you know of the fence running north and south, east of the brick house?
A. No, I don't.

Cross-examination.

Questions by Mr. Henry Seyfried:

Q. You have been down there, have you, Mr. Shannon?
A. I was down there in 1916?
Q. Was Rooker and his wife in possession of the premises?
A. Well, I was not there to see them at that time. I don't think Rooker was there,

Q. Well, he lives there?
A. So far as I know Rooker lives on the farm.
Q. Who?
A. Mr. Rooker.
Q. And who else?
A. I suppose his wife lives with him.
Q. And who else?
A. A daughter.
Q. Who else?
A. That is all I know of.

And further the witness saith not

The plaintiffs, by counsel, now offer to introduce and read in evidence from Sheriff's deed Record 65 of Hamilton County, Indiana, the entries beginning on double page 242.

The defendant, by counsel, makes this suggestion: we do not think it is competent at all, and object to it, but we can shorten this record if it is, if there is any reason why it should go in; there is no need of encumbering the record with that; we can admit that, under the proceedings taken in this case at first, that there was a foreclosure on the theory that this instrument was in fact a mortgage; there was a foreclosure and a sale of that, and that that was appealed to the Supreme Court and reversed, and the opinion has been certified back and become a part of the record of this court in this cause, and for that reason we are objecting to the competency of this record; as I say, if the Court thinks it is competent for any purpose, this admission of ours will obviate the necessity of encumbering the record.

(By Mr. Rooker:) Your Honor, we offer it for the purpose of showing that, following up their repudiation of this trust agreement, they instituted proceedings on the theory of that repudiation and dealt with this trust agreement as being a mortgage which they foreclosed, and under their decree of foreclosure they sold and acquired title adverse to this trust, acquiring title in the name of the Fidelity Trust Company, and not in the name of the Fidelity Trust Company as Trustee.

(By Mr. C. S. Cox:) Your Honor please, it strikes me this way: this is a part of the records of the court in this cause; this court knows of its own records in this cause, and it is futile to prove something that the Court already knows; this is not a new action, it is a continuation of the proceeding of the suit instituted by the plaintiffs in this cause away back in 1913.

(By Mr. Rooker:) The Court is not judicially advised as to the method in which its records were executed.

(By the Court:) Gentlemen, I can't see where this deed to Dora E. Rooker could be material, or for what purpose it could be material.

(By Mr. Rooker:) I want to say, before your Honor makes a ruling, I want to say we will follow up this record showing that, prior to the sale mentioned in that deed, the Marion County lands

embraced in this trust have been sold on execution, sold by the Fidelity Trust Company under the judgment and decree of this court in this cause, and that title was acquired by the Fidelity Trust Company, and we offer this on the theory that those titles were adverse to the title of the Trustee and adverse to its right, and were a consummation, and that all these things were hostile to the interest of the trust estate and in violation of the Trustee.

(By the Court:) Do you say you aim to introduce this sheriff's deed to show that fact, to show that there was hos-
462 tility here as to the trust?

(By Mr. Rooker:) Yes, that is our purpose. They attempted to acquire this trust estate to the exclusion of the trust, and we will follow that up by showing there were other claimants against this trust fund other than the parties.

The Court then overruled the objection of the defendant, to which ruling of the Court the defendant, by counsel, then and there took an exception.

The plaintiffs, by counsel, then introduced in evidence and read to the Court the entries beginning on double page 242 of Sheriff's Deed Record No. 65 of Hamilton County, Indiana, which entry is in the words and figures following, to-wit:

"No. 8073.

242.

Sheriff's Deed on Decree.

This indenture, made this 28th day of September, A. D. 1915, between Oscar Woddell, Sheriff of Hamilton County, in the State of Indiana, of the first part, and Fidelity Trust Company, of Indianapolis, Indiana, of the County of Marion, and State of Indiana, of the second part, witnesseth:

That whereas, at the October 1913 Term of the Hamilton Circuit Court, Fidelity Trust Company of Indianapolis, Indiana, recovered by judgment of said Court, in a certain action therein against
463 Dora E. Rooker and William V. Rooker in the sum of Twenty thousand five hundred thirty-one Dollars and twenty-four Cents, for damages, together with the further sum of Three Hundred thirty-two Dollars and ninety Cents, for costs in that behalf expended, and a decree for the sale of all the interest, estate, right, and title of the defendant Dora E. Rooker in and to certain real estate described therein, as follows, viz: All the west half of the north half of Section 18, township 18 north range five East lying west of the Lake Erie & Western railroad, containing 92 acres more or less; Also, the southwest quarter of section 7, township 18 north, range 5 east, lying west of the Lake Erie & Western railroad and East of White River, containing 48 acres more or less; Also, the southeast quarter of Section 12, township 18 north, range 4 east, lying south and East of White river, containing 60 acres more or less; Also, that part of the Northeast quarter of Section 13, township 18 north, range 4 east more particularly described as follows: Beginning at the northeast corner of said section and running thence

west with said section line one hundred and thirty-two rods more or less to White river, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five acres more or less, all situated in Hamilton County, Indiana. All without any relief whatever from
464 valuation or appraisement laws, as by the record thereof remaining in said Court more fully appears.

And whereas, Afterwards, to-wit: on the 22nd day of August, A. D. 1914, a copy of said judgment and decree was duly issued, and under the seal of said Court, attested by the Clerk thereof, directed to the Sheriff of the County of Hamilton, commanding him that after due and legal notice of the time and place of making the same, he should sell the land above described, with all the interest, estate, right, and title of the defendant Dora E. Rooker therein, or so much and such parts thereof as might be necessary, according to the terms of said decree, to pay and satisfy the judgment aforesaid, with the interest and cost thereon; and that he should in like manner also make and return all interest and accruing costs thereon, and make due return of said writ to the Clerk's office at the expiration of one hundred and eighty days from the date of the same.

And whereas, Said copy of judgment and order of sale, on the 25th day of August, A. D. 1914, came to the hands of Henry Brown, then the Sheriff of said County, to be executed, and the said Henry Brown, as said Sheriff as aforesaid, having legally advertised the same, did, on the 26th day of September, A. D. 1914, at the Court House door in Noblesville, in the County aforesaid, between the hours prescribed by law, at public auction first expose to sale the rents and profits for a term not exceeding seven years, of said estate of Dora E. Rooker in and to said real estate, and no person bidding for the same, then offered at public auction aforesaid all the
465 rights, title and interest in fee simple of the said Dora E. Rooker in and to said retal estate, and the said Fidelity Trust Company of Indianapolis, Indiana did then and there bid the sum of Twenty thousand eight hundred sixty-four dollars and fourteen cents, and no person bidding more, the same was in due form openly struck off and sold to the said Fidelity Trust Company of Indianapolis, Indiana for the said sum of Twenty thousand eight hundred sixty-four dollars and fourteen cents, being the highest bidder, and that being the highest price bid for the same.

And whereas, Also on said 26th day of September, A. D. 1914, as required by law, said Sheriff executed to said purchaser a certificate setting forth the foregoing facts, with the condition appended, that if said premises were not redeemed within one year from the date thereof, by payment of the purchase money, with ten per centum interest thereon, by said judgment defendant, Dora E. Rooker her heirs or assigns, to said purchaser, or its assigns, said Fidelity Trust Company of Indianapolis, Ind. would be entitled to a deed of conveyance thereof.

Now, therefore, To confirm to said Fidelity Trust Company of

Indianapolis, Indiana, the sale so made as aforesaid, the said Oscar Woddell, as Sheriff as aforesaid, in consideration of said sum of One ($1.00) Dollars and no Cents, to him in hand paid by said Fidelity Trust Company of Indianapolis, Indiana, the receipt whereof is hereby acknowledged, and of the non-redemption of said real
466 estate, as provided by law, hath Granted, Bargained and Sold and doth by these presents Grant, Bargain, Sell, Convey and Confirm to the said Fidelity Trust Company of Indianapolis, Indiana heirs and assigns forever, all the following real estate, situate in the County of Hamilton and State of Indiana, to-wit:

All the west half of the north half of Sectioin 18, Township 18 north, range 5 east lying west of the Lake Erie & Western railroad containing 92 acres more or less; also, the south-west quarter of section 7, township 18 north, range 5 east lying west of the Lake Erie & Western railroad and east of White river containing 48 acres more or less; also the southeast quarter of section 12, township 18 north, range 4 east lying south and east of White river containing 60 acres more or less; also, that part of the northeast quarter of section 13 township 18 north, range 4 east, described as follows: Beginning at the northeast corner of said section and run- west with said section 132 rods more or less to White river; thence southerly with the meanderings of said stream to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods; to the place of beginning, containing 75 acres more or less situated in Hamilton County, Indiana.

To have and to hold, all and singular, the premises aforesaid, with the privileges and appurtenances, to the said Fidelity Trust Company of Indianapolis, Indiana heirs and assigns, forever, in as full and ample a manner as the same was held by Dora E. Rooker
467 immediately before the execution of the mortgage mentioned in said decree, foreclosing the same.

In witness whereof, the said Oscar Woddell, as Sheriff as aforesaid, had hereunto set his hand and seal the day and year above written.

OSCAR WODDELL. [SEAL.]
Sheriff of Hamilton County.

STATE OF INDIANA,
Hamilton County, ss:

Before me, Will F. Wall Clerk of the Hamilton Circuit Court, in and for said County, personally came Oscar Woddell, Sheriff of said County, and acknowledged the foregoing conveyance to be his voluntary act and deed as such Sheriff.

In witness whereof, I hereunto subscribe my name and affix my seal of office, this 28th day of September A. D. 1915.

[SEAL.] WILL F. WALL.
Clerk Hamilton Circuit Court.

Recorded this 28th day of September, A. D. 1915, at 1 o'clock P. M.

JOEL D. BRAY.
Recorder Hamilton County."

The plaintiffs, by counsel, next offer in evidence the memoranda which I will have the reporter mark for identification as Plaintiffs' Exhibit No. 3, being the certified copy of the Sheriff's Deed executed to the Fidelity Trust Company for the Marion County lands-
468 described in this trust agreement.

(By the Court:) It may go in.

The plaintiffs, by counsel, then introduced in evidence and read to the Court the certified copy of Sheriff's Deed marked Plaintiffs' Exhibit No. 3, which Exhibit is in the words and figures following, to-wit:

PLAINTIFFS' EXHIBIT NO. 3.

"#11882.

Sheriff Marion County

to

Fidelity Trust Co.

This Indenture, Made the 8th day of June, 1915 between George V. Coffin, Sheriff of Marion County, Indiana, and Fidelity Trust Company of Indianapolis, Indiana, Witnesseth:

That whereas, on the 6th day of January 1914, in the Circuit Court of Hamilton County, Indiana, in Cause No. 16338, Wherein William V. Rooker and Dora E. Rooker are plaintiffs and Fidelity Trust Company is Defendant, the said Plaintiff recovered judgment against the said Defendant Fidelity Trust Company for the aggregate sum of twenty three thousand two hundred one and 44/100 dollars and costs, $298.85 and also an order for the sale of the real estate hereinafter described, all without relief from valuation or appraisement laws; which judgment and order of court will more fully appear upon order Book No. — at page —, of the records of said Court.

That thereafter, on the 14th day of May, 1914, the Clerk
469 under the seal of said Court, issued to the Sheriff of Marion County, a copy of said judgment and order of sale, which came to the hands of Theodore Portteus then the Sheriff of said County, on the 14 day of May, 1914, to be executed, who pursuant thereto, after having advertised the sale of said real estate in the manner prescribed by law, did, thereafter, on the 6th day of June, 1914, at the door of the court House, of said County, between the hours prescribed by law, sell the fee simple of said real estate to Fidelity Trust Company of Indianapolis, Indiana for the sum of Four Thousand and no/100 Dollars, and issued to said purchaser a certificate of sale.

(See record of such sale upon Execution Docket No. Q page 253.)

That thereafter, on the 8th day of June 1915, the Clerk of said Court certified upon said Certificate that there had been no redemption of said real estate from said sale.

Now Therefore, in consideration of the premises and of the sum of Four Thousand and No/100 Dollars, so paid as aforesaid, the said George V. Coffin, Sheriff of Marion County, Indiana, does hereby sell, convey and confirm unto the said Fidelity Trust Company of Indianapolis, Indiana the said real estate described as follows, to wit:

The Southeast quarter of the Northeast quarter of section 33, township 17, north range 4 east containing 40 acres more or less, also the southwest quarter of the northwest quarter of section
470 34 township 17 north range 4 east containing 40 acres more or less situated in Marion County, Indiana, said lands was sold subject to a mortgage held by the Indianapolis Life Insurance Company in the sum of $6,000.00 Sold as the property of William V. Rooker & Dora E. Rooker. (U. S. R. S. $4.00.)

In Witness Whereof, Said Sheriff has set his hand and seal the date first above written.

GEORGE V. COFFIN. [SEAL.]
Sheriff Marion County, Indiana.

STATE OF INDIANA,
Marion County, ss:

On this 8 day of June, 1915, personally appeared George V. Coffin, who, in the capacity of Sheriff of said County, acknowledged the execution of the foregoing Deed.

In Witness Whereof, I hereunto set my hand and Notarial Seal.

THEODORE STEIN, JR., [L. S.]
Clerk Marion Circuit Court.

Recorded June 8, 1915 at 11.20 o'clock A. M.

STATE OF INDIANA,
Marion County, ss:

Recorder's Office.

I, Edward Ramsay, Recorder in and for said County, do hereby certify that the above is a true and complete copy of the record of a Sheriff's Deed from Sheriff Marion County to Fidelity Trust Company as the same appears on the Records of this office in Land Record No. 61, Page 78, of which record I am the lawful custodian.

Witness, my hand and official seal, at Indianapolis, this
471 24th day of October A. D. 1917.

[Recorder's Seal of Marion Co., Indiana.]

EDWARD A. RAMSAY,
Recorder Marion County, Indiana.

WILLIAM M. FOGARTY, witness, recalled by plaintiffs.

Direct examination.

Questions by Mr. W. V. Rooker:

Q. You are the same——

(By Mr. C. S. Cox:) Before Mr. Fogarty proceeds to testify, I don't like the idea of doubling up on this record; these matters, with perhaps an exception on this last paper that has been introduced in evidence, are all matters, part of the records of this court, and perhaps, of course, in this particular case, and we could save all that by the admission which we have offered to make, if it is material and relevant, that it is true that these lands were sold
472 under the former decree of this Court, at sheriff's sale, and there was an appeal from the judgment of this Court to the Supreme Court, which reversed that decree and nullified these sales, and we want to say now, in behalf of the Fidelity Trust Company, Trustee, that the Trustee does not claim any right or title in this action now under those sales or under that decree upon which these sales were made, and makes no claim either as Trustee or any other particular on these lands by virtue of those sales, but that it is claiming the fee simple title as trustee to these lands by virtue of the judgment of the Supreme Court rendered in that decision.

(By the Court:) Your objection is coming rather late, Judge.

(By Mr. Seyfried:) We want the Court to know that we are not claiming any title.

(By Mr. Rooker:) I wish your Honor to notice that possession is taken only by the Fidelity Trust Company as Trustee.

(By the Court:) The record is clear, proceed with this witness.

Q. Mr. Fogarty, you may tell the Court if, after the beginning of this suit, you acquired what is known as the American Central Life Mortgage on the Hamilton County farm?

473 A. Yes, sir.

Q. Have you that assignment in court, for that mortgage?

A. Yes, I have all the papers.

Q. Will you show me the assignment of that mortgage to you?

A. Yes.

Mr. Fogarty, if there is any difficulty we will withdraw the question.

The witness excused by the court.

WILLIAM V. ROOKER, plaintiff, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above entitled cause, testified as follows:

Direct examination.

Questions by Mr. F. G. Christian:

Q. You may state your name to the Court please?

474 A. William V. Rooker.

Q. You are the husband of the plaintiff Dora E. Rooker?

A. I am.

Q. In what business have you been engaged?

A. Well, I am an attorney practicing law, and live on the farm.

Q. You live on the farm?

A. Yes.

Q. Known as the Hamilton County farm belonging to Rookers?

A. Yes.

Q. How long have you lived there?

A. I have lived since, I believe, 1907 or 1908, that we moved there from Indianapolis.

Q. You are also the owners of certain lands in Marion County described in the complaint and in the exhibits which have been introduced here?

A. Yes.

Q. Now some time previous to 1909 you may tell the Court whether or not you started the erection of a house on that land?

A. We did on the Hamilton County land.

Q. On the Hamilton County land: that land is down here south of Noblesville?

A. Well, the north end of the farm is possibly a quarter or half mile south of the south corporation line of Noblesville.

Q. The land is situated east of White River?

A. Yes.

Q. And between White River and the Lake Erie track?

A. Yes.

475 Q. Of how many acres does the Hamilton County land consist?

A. My recollection is it is about two hundred and seventy or seventy-five: the deeds will show exactly.

Q. What is the character of that land, as to being bottom land or up-land?

A. It is about equally divided between bottom land and upland.

Q. And on the farm——

A. Possibly more up-land than bottom land.

Q. And with the exception of the house I have spoken of, there are some other tenant houses?

A. Three.

Q. Now while erecting that house, you may state to the Court, without giving any detail, whether or not you became embarrassed financially, that is, on account of the erection of this house?

A. We did.

Q. And I will ask you to state whether, shortly thereafter, you entered into some kind of arrangement?

A. We entered into the agreement that has been introduced in evidence in this case.

Q. Those agreements were executed by you and your wife, and the Fidelity Trust Company by its proper officers?

A. Yes.

Q. Now, after the execution of those instruments, you may state what, if anything, the officers or agents of the Fidelity Trust Company did towards carrying out the terms of the agreement?

A. They paid certain orders drawn on them by Mrs. Rooker.

Q. What was the character of these orders?

476 A. They were for farm maintenance, and pay-rolls on the house and on the farm, and they were also for some of the material and work done in and to the erection and construction of the house.

By the Court:

Q. How much did that all amount to?

A. I don't know, Judge, I don't remember the aggregates; I can total it up, but it has always been a matter of figures.

Q. Can you approximate it, Mr. Rooker?

A. No, I could not, Mr. Christian.

Q. Now, how long did they continue to honor the orders written by Mrs. Rooker on account of the erection of this building, of the building and maintenance of the farm.

A. Until, I think, in July of 1910 or 1911, I am not certain as to the year, but it was the month of July.

Q. Now, during that time, who actually managed this farm, if any one?

A. Well, I was.

Q. Prior to 1910?

A. I was living on the Noblesville farm and looking after it as best I could.

Q. Do you have those orders here that Mrs. Rooker drew against the Trust Company?

A. No, I have not; they were taken up by the Trust Company until the one when they refused to go further. Some court reporter has got that some place.

Q. You have made a search?

A. Yes, I have not been able to find it.

Q. Now you stated that some of these orders were given 477 for the purpose of paying for the maintenance of that farm; now, for instance tell the——

The defendant, by counsel, objects, those orders will show for themselves what they are for, and oral testimony is not competent; if there are any particular orders I think they can examine it.

(By the Court.) The only way to prove it is by the orders.

A. The last one was one they didn't take up, the one—that is the last one they didn't take up is lost.

Q. Now you spoke of that certain allowances were paid out by the Fidelity Trust Company for maintenance of the farm; what do you mean by that, in what particular?

A. They made the pay-roll, or part of it, and they bought seed and——

The defendant, by counsel, object-, that is merely trying to get out in another way a matter that the Court has already sustained an objection to; I say if there are any of these particular orders that you want, if you will tell us what they are, we will furnish them.

(By the Court:) He can testify from his own knowledge, if he knows.

A. They paid for farm labor, and for seed used on the farms, they paid for material and workmanship on the house; they paid some claims that were against the house at the time this deed was executed or this trust agreement, and they paid some debts in
478 bank, including some debts to themselves as bankers.

Q. Now, Mr. Rooker, was this house completed?

A. It was not; is not now, for that matter.

Q. Never was completed?

A. No, sir.

Q. Now, I will ask you to state when it was, if you remember, that a notice was served upon you which has been called, in this case, a notice of repudiation; do you have that instrument there?

A. Well, it was on the 28th of October, 1912, at four o'clock in the evening.

Q. Now at the time of the execution of the original trust agreement, I wish you would describe to the Court, briefly and generally, the condition of these lands, the farms and their improvements?

A. Well, the Marion County land consisted of eighty acres; it had a highway running north, north and south dividing the two forties; that highway was on the township line between Washington and Lawrence Townships, in Marion County; at the south end of the farm that highway extended west so that the Washington Township forty had a highway on its east side and its south side; the division fence ran east and west dividing that forty into two fields of substantially the same area; on the east side of the road and in Lawrence Township were the buildings; they consisted of the farm house, cellar, cistern, a two-story frame house, with a barn forty by sixty feet and holding—containing thirty stalls, with cribs and oats bin down stairs, and feed bins up stairs and a mow with an estimated capacity of one hundred and twenty tons of baled hay or
479 straw; there was a double crib built with a scale-house, east of the barn; that building was, as I remember it, forty feet long and was thirty-six feet square from out to out; it had a grain bin up stairs and cribs on the side, and a wagon scale, I don't remember whether four or six ton, we will say four-ton scale in the driveway; and then we had a hen house and one or two other small outbuildings that usually go with property.

Q. What was the character and condition of the fences on the farm at that time?

A. The west forty was entirely enclosed with woven wire fencing and was in good condition; the east forty was enclosed along the road with picket fence, and the fence separating the woods from the tillable land on the east side was a rail fence; the woods was entirely enclosed with rail fences except at the south, I don't know as to it, it may have been part picket down there.

Q. Now the fences on this farm at that time, state whether or not they were stock proof?

A. Yes, they were good fences, they had been in a few years, and had been worn some, but they were good fences.

Q. Now describe briefly the condition and kind of improvements on the Hamilton County property, except the buildings which you have already mentioned, for instance, the fence and other buildings in 1909?

A. Well, in 1909 there were three dwelling houses, aside from the new house, and two barns, I believe the north barn burned prior to that, I am not certain; well, it had a barn prior to 1909, and
480 the shed, out-buildings that go with a farm, such as wood-house, smoke-house.

Q. About the fences?

A. Well, the fences were in a fair state of repair; they had all been built since I got the farm, and I got the farm in 19—, I think the fences on the Noblesville farm were built about 1900 or 1902, the oldest, and some were built after that.

Q. They would turn stock?

A. Oh, yes, we had a great deal of stock down there at that time.

Q. Now at the time the Fidelity Trust Company entered into this agreement with you, who was doing the actual farming of the Marion County farm, who was the tenant?

A. I think I was operating the farm with employes, as I remember it.

Q. How long did that arrangement continue?

A. That had been going on——

Q. How long did it continue after they entered this agreement with you?

A. Well, now, I don't know, Mr. Christian, whether it was 1910 or 1911 that that ceased, that it was interrupted. That is the time I am unable to fix because I have not got the order, it was either July of 1910 or 1911; my impression is—well, I won't state it either.

Q. You were living during that time on the Hamilton County farm, and who was farming it?

A. I was, in the same manner, by employes; if you will let me refresh my recollection by looking at the bill of particulars I can tell whether that was 1910 or 1911.

(The attorney hands the witness the complaint.)

481 A. It was July 1910 that the interruption came.

By the Court:

Q. July 1910?
A. Yes, sir.

By the Court:

Q. That is, the interruption between you and the Fidelity Trust Company?
A. That is when they stopped paying.

By the Court:

Q. How much money had they given to you or loaned to you, or spent for you, up to that time?
A. I don't remember, Judge, but I think those vouchers state accurately the amount, I have not calculated them; I have calculated them but don't remember what they show.
Q. Now the interruption was the time they served the notice?
A. No, I went down with an order, and they refused to pay it, said they would not.
Q. Then the notice was served after that?
A. Yes, the notice was served a year or so after that.
Q. Since that time has that land been cultivated?
A. Partially.
Q. What is the fact as to whether the Marion County land was idle for about two years?
A. My recollection is the Marion County land stood idle three years, and partially idle one year.
Q. Now how far towards completion did you get with this house, just briefly describe that?
A. Well, the house was enclosed and plastered and floored, the heating system was in partially; the water system was not in, except the water pipes were laid under the floors; and the lighting
482 system was not in, except that the wires were laid in the building, no outside connections were made and the light cords were not adjusted to any sort of fixture.
Q. What is the fact as to whether the outside of this house was ever finished?
A. It was not.
Q. Mr. Rooker, I will ask you to state briefly the condition of the farm, that is the fences and improvements, after the Fidelity Trust Company ceased to honor orders and after they had served this notice upon you which has been identified, I believe, as Exhibit No. 3, I am not certain about that?
A. Well, the fences continued to be good, with the ordinary depreciation of time excepted, for probably two or three years after they served this notice, or, no, two or three years after they quit paying the vouchers.
Q. What is the present condition of those fences and buildings on those two farms?
A. Well, they are—the fence lines are still indicated; I keep some old mares down there, they manage to keep them in; we have barb

wire strung along on top of the posts; we have a few sheep, we have to keep them up except when we herd them.

Q. What is the fact as to whether the fences on either of the farms is stock proof?

A. Oh, no, not at all.

Q. Now, it is not possible for you to use the pasture land on the farm?

The defendant, by counsel, objects to the question for the
183 reason it calls for a conclusion.

The plaintiffs, by counsel, then withdrew the question.

Q. What is the fact as to whether or not it is possible to use the pasture lands on this farm, or the fields?

The defendant, by counsel, objects to the question, the better way would be to describe the fences.

The court overruled the objection of the defendant, to which ruling of the Court the defendant, by counsel, then and there took an exception.

(By the Court:) He may answer this to save time.

A. I am able to keep in the horses, and I am able to keep in one of the cows; I have twelve sheep, I can't keep them in; I had to sell the hogs off four or five years ago, could not keep them at all on the farm.

By the Court:

Q. Who has recovered, Mr. Rooker, the rents and profits of this land since the starting of the building of this house, during the years the land has been tended?

A. Well, if there were any profits coming to anybody, I and my wife got them, but we have got a very small amount. We have applied, since this *quit*, we built a garage and we spent—well, we have spent about two thousand five hundred dollars of that money on improvements of the land, built the garage and power plant for the lights, as contemplated by the original drawing.

Q. Then the leasing that has been done has been done by
184 you and your wife?

A. No, Mrs. Rooker has not participated.

Q. Well, you have done that?

A. Yes, I have leased the land and applied the proceeds, so far as I could, to keep the farm up.

Q. Did you attempt to lease this two hundred and seventy acres last year?

A. I leased a corn privilege on it; I have received out of that, I think, about fifteen dollars.

By the Court:

Q. Well, is it a fact the corn was not gathered?

A. No, that is not correct; the tenant went in and gathered his part of it and left the landlord's part in the field, and a receiver was

appointed to gather it, and the flood came along and washed it nearly all away, and there is possibly twenty shocks of fodder down there standing in the field; this fodder standing out and that has been wet up to almost the tassel of the fodder shock, and I don't believe your Honor could find a single sound ear of corn in all those shocks; they were submerged under water for about two weeks, that is while the receiver had charge; then there is a little back west of the farm you can find an ear of corn here and there that the flood did not take.

By the Court:

Q. Did you rent the wheat ground on the farm last winter?
A. There was none.

By the Court:

Q. Oats ground?
A. Yes, we got fifty—I think about sixty acres of oats.

By the Court:

Q. On the two hundred and seventy?
485 A. Yes, there was.

By the Court:

Q. How much corn was there on that farm last year?
A. Well, there was supposed to be one hundred and ten acres.

By the Court:

Q. And you rented that?
A. Yes, the corn got hurt, the man got it in very late and it got hurt by the frost, never matured.

By the Court:

Q. Go ahead, Mr. Christian.
Q. Is there anything else you wish to testify to, Mr. Rooker, that I have not asked you about?
A. Well, I don't know, Mr. Christian, I don't recall anything.
Q. Mr. Rooker, I wish to call your attention to the loss of some oats crops there in 1910, I believe an oats crop on each farm: explain that?
A. There is thirty acres on the Hamilton County farm, and about nineteen or twenty on the Marion County farm were lost; that was the time they refused to advance money to pay the hands.
Q. That was the time?
A. Yes, the hands quit and I could not get anybody to help me harvest the crops.
Q. Now, Mr. Rooker, you have stated where a portion of the earnings or profit from this farm were spent, that is, making certain improvements, I call your attention also—I will ask you whether or not

a portion of this money was spent in defending the title, the trust title?

A. It was.

Q. Under litigation?

A. As against the Fidelity Trust Company in this suit.

486 Q. And were there other litigations during the time of this trust?

A. Yes, sir.

Q. Concerning liens?

A. Yes.

Q. Claims for the improvements on this house?

A. Yes.

Q. And a portion of this money was spent in defending this title on the former suit that was tried here, that is, this same cause of action?

A. Yes, sir.

Cross-examination.

Questions by Mr. C. S. Cox:

Q. At the time this trust agreement was entered into, you were operating these farms yourself, Mr. Rooker, for you and Mrs. Rooker, though paid employes, were you?

A. Yes.

Q. And how long did that continue?

A. Well, it was interrupted by * * *

By Mr. T. E. Kane:

Q. Wait a minute, he asked how long it continued?

A. Well, until July, 1910, and then it was—after that it was resumed for a little while, and then broken up again.

Q. And how long was it interrupted, as you say, in July, 1910?

A. Well, we lost the oats crop that year entirely, and we saved a part of the corn crop, the corn crop didn't amount to very

487 much.

Q. Now, if I understand you, you went to the Fidelity Trust Company July '10, in July, 1910, and asked them to honor an order for how much money?

A. Well, I don't know; it was the back pay-roll, and farm maintenance, and some stuff on the house, my recollection is, Judge, it was two hundred dollars.

Q. That was for farm hands to save the oats?

A. No, I didn't say that; I said it included—a part of the work on the house, the men were still there.

Q. And because they didn't furnish that money, you lost thirty acres of oats on the Hamilton County farm, and nineteen or twenty acres of oats on the Marion County land?

A. Every farm hand I had, quit, yes, the report got out I was unable to pay my debts, and I could not get farm hands or help of any kind.

Q. And you made no effort to get those two crops in after the Trust Company declined to pay your hands?

A. Oh, I made every effort possible, every effort I could conceive.

Q. And yet failed?

A. Yes, I even tried to divide it up with people, and they thought it didn't belong to me.

Q. And still call yourself a farmer?

The plaintiffs, by counsel, object to the question as being frivolous.

The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there took
488 an exception.

Q. Now, Mr. Rooker, you say you spent two thousand five hundred dollars of the proceeds of the products of these two farms on improvements on the farms?

A. Yes.

Q. What particular improvements did you make out of that two thousand five hundred dollars so appropriated, on the Marion County place?

A. I don't at this time recall any, Judge.

Q. And what particular improvements did you make on the Hamilton County farm, out of this two thousand five hundred dollars appropriated?

A. Well, we put in the sewage system; we put in the conduit system for the electric lighting; we put in the conduit system for the water and heat; and dug a cistern and built it, a large cistern; and we built a power house, the upper story of which was built on the hillside, as used as a garage, and painted the house, think, twice.

Q. You don't mean the new house?

A. Oh, yes, I mean the new house.

Q. Outside?

A. Yes, and partially inside, not all of it inside; we painted everything that was paintable on the outside.

Q. You were in possession of the Marion County premises—I mean the Hamilton County premises, personally, you and your wife, prior to the time this trust deed was executed, and at the time, and at all times since, is that not true?

A. Well, we were up to the time that the—unqualifiedly
489 up to the time this trust deed was executed, and chiefly after that.

Q. Well, you have had the physical possession of the premises since then?

A. Oh, yes.

Q. At all times?

A. In a sense that is true, yes.

Q. Now you say your personal farming there was interrupted in July, 1910, and afterwards resumed again; how long did your personal oversight of the farming of the Hamilton County farm continue?

A. Well, I think I resumed, got some men to work for me along

in the fall, when it came to corn gathering, and I paid them out of some of the corn as we gathered it.

Q. Then the next crop year, the year of 1911, what was the condition of things, how did you do it.

A. Well, my recollection of the next year, either the next year or the year after, was one of the idle years, the Marion County farm was not farmed.

Q. I am talking about the Hamilton County farm now?

A. The Hamilton County farm was personally farmed.

Q. That is, you farmed it personally, that is, you had it done?

A. Yes, sir.

Q. And the year 1912, what about that, did you farm it through your own employes, or lease it to somebody?

A. Well, now, Judge, I can tell you better about that in this way: I have leased that farm, the Hamilton County farm, partially, and leasing it again in 1915, as I remember it, leasing corn
490 ground.

Q. And continued up to last year?

A. Yes.

Q. Who did you lease it to, Mr. Rooker, in 1915, the first year?

A. Well, the first lease was made in 1915, and that was to Mr. Johnson; that continued—that lease, as I remember was made in September or October, and that continued throughout that year and throughout the next year after it; I am a poor hand to remember dates.

Q. And then in 1917 you leased to Mr. Thomas E. Kane?

A. Thomas E. Kane.

Q. How long had you known Thomas E. Kane?

A. Well, I had met him on juries in Marion County, and met knew who he was by sight for a number of years, but I never knew that his—never knew him intimately, to know the kind of man he was or business he was engaged in, until about——

Q. Mr. Rooker, didn't you know what everybody in Indianapolis knew, that he was the most notorious crook in Indianapolis?

A. I did not; I wish I had; if you had told me you would have done me a great favor.

Q. Well, you had trouble with him?

A. He gathered his crop and left mine in the field, and appointed a receiver to collect back the landlord's lien from the people he sold his corn to. My part of the corn, except a little, is washed away; there may be some corn down there.

Q. When was it washed away?

A. In the winter, this last winter, we had a flood that went
491 over.

Q. It was a long winter, what part of the winter was it, Mr. Rooker?

A. Well, I should say it was in January or February; we had a very heavy snow came early and lasted a long time; the receiver could not get people to gather the corn on account of the snow; that snow went off with a flood, and the flood took the corn, except the fragmentary stuff that is down there now.

Q. During all these years that you have been in possession of both the Hamilton and Marion County farms, you and Mrs. Rooker received all of the proceeds of those farms that would come to the owners, that is, all except the tenant's share, did you?

A. Well, of the parts that were leased, yes.

Q. And when you were farming them with hired help, you and Mrs. Rooker received all the profits, over and above the costs?

A. Yes.

Q. And had the full management and control of these places.

A. Prior to the time we made this contract we did, yes.

Q. And the Fidelity Trust Company received none of the proceeds of either of these farms during all those years?

A. That was my recollection of it; if they received any I don't know it.

Q. And it is a fact also, Mr. Rooker, that the Fidelity Trust Company paid the taxes on both of these farms during all these years?

A. I don't know as to that.

492 Q. You didn't pay them out of the proceeds, did you?

A. I have paid some taxes and they have paid some.

Q. You have paid none of the taxes on the farms out of the proceeds of the farms, did you?

A. I don't recall any, Judge.

Q. If you did pay any taxes, it was merely on the personal property, was it not?

A. Yes, I have paid the personal property taxes.

Q. The Fidelity Trust Company as trustee at no time interfered with your control over this property as manager and as farming it and leasing it, did it?

A. Oh, I think materially they did; I could not lease it because farmers told me I had no right to; would not put out crops on the ground, said the Fidelity Company could sell it at any time.

Q. What did any person in authority with the Fidelity Trust Company, or connected with it, ever say to you in the way of a demand that you should relinquish any possession or control over either of these properties?

A. They never said it to me, but it came to me as having been said by them to other people.

Q. Now, will you tell us the name of one man that told you they would not lease it because the Fidelity Trust Company had warned them not to?

A. Yes, a fellow by the name of Brown, that I had leased the lower farm, to sign up a contract, he came back and told me he understood I had no right to lease that farm, he had been told it belonged to the Fidelity Trust Company and they could sell his crop.

Q. What fellow by the name of Brown, what was his first

493 name and where did he live?

A. I don't know, I have the written contract with him down to the office, my recollection is it was Henry or Joseph.

Q. Where did he live?

A. I don't remember.
Q. And when was this?
A. Well, I think that was the first year the farm stood idle, as I remember, Brown didn't take it.
Q. What year was that?
A. I don't remember the year.
Q. Which farm was it, the Hamilton County farm?
A. The Marion County farm.
Q. You say you have that writing in your possession?
A. Yes.
Q. Will you produce it here tomorrow?
A. I will endeavor to do so, yes, if I can get in to the City tonight.
Q. Now, did Brown represent to you that he had been to the Trust Company?
A. Well, that is the information I got, yes, the impression I got, he had investigated the matter, and I had no right.
Q. Now, what other prospective tenants, you spoke of numerous ones?
A. Well, now, I don't know the names of all of them, Judge; there was a fellow came to me from Boone County, wanted to rent that farm, and went up to look at it, and came back and told me Wood McCormack told him I didn't own the farm and if he put the crop in——
Q. Who told him?
A. Wood McCormack.
494 Q. Who is Wood McCormack?
A. He is a man who lived there south of Castleton, a farmer.
Q. Now, as to the Hamilton County farm, there has never been any interference with your possession of that at any time?
A. Yes, you people sold it and took title.
Q. I am talking about your physical possession of the property, Mr. Rooker?
A. You never put me out of it, no, but these reports were up here.
Q. You have had full possession?
A. These reports were up here, even this spring.
Q. What reports?
A. About me having no right to handle the farm.
Q. As a matter of cold-blooded law, do you think you have got any right to handle the farm?

The plaintiffs, by counsel, object to the question as not being proper cross-examination.
The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there took an exception.

Q. When Brown came to you about leasing this Marion County farm, and told you that somebody had told him the Fidelity Trust Company owned it, what did you tell him?
A. I told him what the contract was between me and the Fidelity Trust Company. I told him I had this contract, and that under the

contract they did have a right to sell the crops, but they had
495 repudiated the contract, and that their right to sell the crops was at an end.

Q. And did you offer to go to the Trust Company with Mr. Brown and make arrangements with they so there could be a tenant on the place?

A. I was finished making contracts with the Fidelity Trust Company.

Q. Read the question, please, Miss Reporter?

(Question read to the witness by the reporter.)

A. No, I didn't; I was through contracting with the Fidelity, I was then in litigation with them.

Q. And as to these numerous others of whom you say they came to you about renting the place and that you failed to rent because the Fidelity Trust Company was claiming the right to control the property and sell the property and crops, did you say to any of them that any arrangements they could make with the Fidelity Trust Company would be all right?

A. I certainly did not; I did not undertake to modify the situation that existed by introducing a third party.

Q. In other words, you felt that the attitude of the Fidelity Trust Company was losing something to the trust estate, and you were not going to help save it?

A. On the contrary, I tried to keep the damages as low as possible.

Q. But you didn't, you say, do anything towards procuring tenants when these prospective tenants came to you?

A. Oh, yes, I did, and I have rented the farm where I could get men to tend it, when the Fidelity didn't hear of it, and the people didn't hear.

496 Q. Can you tell any single instance where the Fidelity has interfered with any tenants on either of the farms, the tenants that you secured?

A. I don't know that they did of any I secured, and I don't know that they did, except hearsay. I have no personal knowledge of their interference, Judge.

Q. Mr. Rooker, you have persistently claimed, have you not, that you had title to both of these farms, you and Mrs. Rooker, and that the Fidelity Trust Company had no title to either of them?

A. That statement is not true; I have always said that the Fidelity Trust Company as Trustee had never parted with the title it got under these trust instruments, and I have sued for that in courts and I have won on it.

Q. That is your attitude now, is it?

A. That they never have parted with the title they got, except now, I say in this litigation that they have repudiated that title, and in fact have resigned as trustee, and it is a law question now as to what their interest is; that is the question your Honor has to decide.

Q. That happened nearly six years ago?

A. Which?

Q. Their repudiation, as you claim, of this trust agreement?

A. That is the only modification of their title that ever has occur-ed that they acquired.

Q. Now, have you not persistently asserted, since October, 1912, that the Fidelity Trust Company had absolutely no title to either of these properties?

A. And I say that now, as to the Fidelity Trust Company
497 in its corporate capacity; I have always admitted the Fidelity Trust Company as trustee had an interest in this land, but there is no privity outside of the relationship.

Q. I am asking you now if you have not persistently asserted, taken the attitude towards everybody, that since October 28, 1912, the Fidelity Trust Company as Trustee had absolutely no claim on either of these properties?

A. Not at all; I have said it had all the interest it ever acquired, except as modified by this act of repudiation, or resignation, whatever it is; they still have the land but refuse to perform the trust; the record title they got they still have, except as modified by their own sale of the property on judgment adverse to the trust estate; I am contending those adverse judgments are unlawful.

By Mr. Henry Seyfried:

Q. I will ask you, Mr. Rooker, whether in the proceeding in the Marion County Court quieting title to the Marion County lands, a special finding of facts and conclusion of law were not entered by the court, and under which finding you found that the Fidelity Trust Company took no title by virtue of the Sheriff's deed, but that it did have a fee simple title to the Marion County lands as Trustee, and that their title as such under this deed of trust and agreement of trust should be quieted and set at rest, that you nevertheless have appealed that case now to the Supreme Court and deny the right of the Fidelity Trust Company to sell the Marion County lands?

A. I certainly have appealed that case, and have appealed
498 it because of the jurisdiction of this court over the subject matter of that controversy; I say if anybody sells that land the receiver that this Court should appoint should conclude this trust.

By Mr. Henry Seyfried:

Q. That is, you are denying now the right of this trustee to sell the Marion County lands, are you not?

A. I am watching this law suit for its full legal effect.

The plaintiffs, by counsel, object to the question as calling for a legal conclusion.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

A. This suit was brought years before that proceeding in Marion County.

Q. Yes or no to that question, Mr. Rooker, please answer that question?

A. I am denying that there is a proceeding now; I say you have either got to fish or cut bait, either perform this trust or get out of it.

Q. And this judgment in the Marion County Circuit Court was rendered in an action that you yourself brought in behalf of Dora A. Rooker and William V. Rooker seeking to have the title to the Marion County land quieted in the plaintiffs Dora E. and William V. Rooker?

The plaintiffs, by counsel, object, the records of the Marion County land would be the best evidence.

499 The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

A. This suit you refer to was brought against the Fidelity Trust Company, not as Trustee, but against the Fidelity Trust Company and Doctor Coffin, Sheriff, etc., to set aside, in the interest and in behalf of this trust estate, the title you had acquired in your unlawful proceedings down there.

Q. And the one paragraph——

A. And I succeeded in that law suit, even in the Marion Circuit Court.

Q. And that suit was filed by William V. Rooker and Dora E. Rooker against the Trust Company and Coffin as Sheriff, was it not?

A. That is my recollection.

Q. In other words, you brought the Trust Company into court did you not?

A. Yes.

Q. And when it came into court, it set up its title under the trust deeds and under the instrument of trust, as claimed under their title, except such as it acquired under the deeds of trust and the trust agreement, did it not?

A. After the Supreme Court set aside the deed it did; but until that time it was insisting it owned this property adverse to the trust estate.

Q. And still you pursued your suit, didn't you?

A. Yes, to the conclusion.

500 Q. And when the Court rendered its finding, removing what you claimed to be a title, by reason of this Sheriff's Deed, and quieting the title of the Trust Company as Trustee, and enjoining you from interfering with the sale of the property by the Trust Company, you appealed from that judgment?

A. I certainly did, and had a right to; I think the Supreme Court is able to take care of its own jurisdiction.

Q. And you will not now suffer the Trust Company, as Trustee, to sell the Marion County land?

A. I am going to protect my suit; when the receiver——

The defendant, by counsel, objects.

A. There is no trustee.

By the Court:

Q. Just answer this question?
A. If there was a trustee, your Honor, I would say, yes, go ahead and sell it.

(By Mr. T. E. Kane:) We submit there is a question that is not answered yet, only by evasion.

A. But the trustee, notwithstanding my objection, is proceeding to sell this land.

By the Court:

Q. Answer that question?

A. I will not let them do it, no, in view of this litigation.

And further the witness saith not.

501 WILLIAM M. FOGARTY, witness recalled by plaintiffs:

Direct examination.

Questions by Mr. W. V. Rooker:

Q. You are the same William Fogarty who previously testified?
A. Yes.
Q. I hand you, Mr. Fogarty, some sheets purporting to be sheets of the Indianapolis Star of Wednesday, January 23, 1918, and on page 15, at the middle of the sixth column, under the heading, "Legal Notices Continued," I direct your attention to the advertisement entitled, "Notice of sale of Marion County farm by Trustee, pursuant to Trustee's Deed," and ask you to look at that advertisement and see if you or your Company inserted that advertisement in that newspaper at that time?
A. Yes, sir.
Q. And how often, Mr. Fogarty, did you advertise the sale of the land in the newspapers of Indianapolis this year?
A. This notice?
Q. Yes?
A. I don't know.
Q. It appeared more than in that one date that you have?
A. I don't know of my own knowledge.
Q. But you remember that advertisement being issued by your company?
A. Yes.

502 The plaintiffs, by counsel, now offer to introduce and read in evidence the advertisement which has been marked by the reporter for identification as Plaintiffs' Exhibit No. 4.

(By Mr. C. S. Cox:) If there are other notices, and there are, and you want them, we will have the party connected with the real estate department of the Trust Company, who has been endeavoring to sell the Marion County land, here tomorrow, if you want him.

The plaintiffs, by counsel, then introduced in evidence and read to the Court Plaintiffs' Exhibit No. 4, which Exhibit is in the words and figures following, to-wit:

PLAINTIFFS' EXHIBIT No. 4.

"The Indianapolis Star, Wednesday, January 23, 1918. 15.

Legal Notices.

(Continued.)

Notice of Sale of Marion County Farm by Trustee Pursuant to Trustee's Deed.

Pursuant to the deed of trust and trust agreement executed contemporaneously therewith, on the 11th day of October, 1909, by Dora E. Rooker and William V. Rooker, her husband, first parties, and Fidelity Trust Company, second party, the said Fidelity Trust Company, trustee, will offer for sale on Wednesday, February 6th, 1918, at the hour of 10 o'clock, a. m. at its office, No. 148 503 East Market Street, Indianapolis, Indiana, the following described real estate, situated in Marion County, State of Indiana, to-wit:

The southeast quarter of the northeast quarter of section thirty three (33), township seventeen (17) north, range four (4) east containing forty (40) acres, more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

The above described lands being known in the neighborhood as the Rooker farm and situated east of the Lake Erie & Western Railroad and one and three-quarters miles south of Allisonville on the road dividing Washington and Lawrence Townships, the first described tract laying in Washington Township and the second in Lawrence Township.

FIDELITY TRUST COMPANY.
Trustee.

By WILLIAM M. FOGARTY,
President.

Attest:
JAMES G. FLAHERTY,
Secretary.

To prospective bidders:

Full particulars regarding the above described lands offered for sale will be furnished on application and parties desiring to inspect the same will be taken out to the farm by appointment.

FIDELITY TRUST COMPANY,
Trustee.

148 East Market Street, Indianapolis, Ind."

The witness was excused.

The plaintiffs rest.

504 And the Defendant, to maintain and support the issues on its behalf, introduced the following evidence:

WILLIAM M. FOGARTY, witness called for defendant:

Direct examination.

Questions by Mr. Henry Seyfried:

Q. State your name to the Court?
A. William M. Fogarty.
Q. You are President of the Fidelity Trust Company?
A. Yes.
Q. And were you the President of the Company in October, 1909?
A. Yes.
Q. And when was the Company organized prior to that date?
A. June 1909.
Q. You have been President from the time of its organization to the present time?
A. Yes, sir.
Q. Mr. Fogarty, I will hand you an instrument marked Defendant's Exhibit 1, and you may tell the Court generally what that is.
A. That is a trust deed.
Q. To what land?
A. To Hamilton County lands.

505 Q. And was that deed executed as it purports to be, by Dora E. Rooker and William V. Rooker and delivered to the Fidelity Trust Company?
A. Yes.
Q. And you sent it to the Recorder's office and had it recorded, did you?
A. Yes.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 1.

The plaintiffs, by counsel, object as a duplication of the record, I think that went in this morning.

(By the Court:) Are they both in; there is not need to put it in again.

The defendant, by counsel, withdraws the offer.

Agreement.

It is stipulated that the trust agreement and the two trust deeds introduced this morning may be considered in evidence as part of the defendant's case.

(By Mr. Seyfried:) Now, your Honor, in order that there be no confusion about this, we want the record to show Defendant's Exhibits 1 and 2 are substituted for Plaintiffs' Exhibit 1.

506 DEFENDANT'S EXHIBIT NO. 1.

"Deed.

This indenture witnesseth, That Dora E. Rooker and William V. Rooker, her husband of Hamilton County, State of Indiana,

In consideration of One Dollar ($1.00), the receipt of which is hereby acknowledged, and other good and valuable considerations by them had, convey and warrant, to the Fidelity Trust Company, of Indianapolis, Indiana, Trustee, the following real estate in Hamilton County, State of Indiana, to-wit:

All the west half of the north half of section eighteen (18) township eighteen (18) north range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

Also the southwest quarter of section seven (7) township eighteen (18) north range five (5) east, lying west of Lake Erie and Western Railroad and East of White River, containing forty-eight (48) acres more or less.

Also the southeast quarter of section twelve (12) township eighteen (18) north range four (4) east containing sixty (60) acres more or less and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13) township eighteen (18) north range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods more or less to White River, thence
507 southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres more or less.

To have and to hold, Said real estate, however, in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; To execute the proper Trustee's deed or deeds conveying the title thereto in fee-simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers, as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Trustee.

And said Fidelity Trust Company, of Indianapolis, as such Trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of
508 said real estate and convey same free and clear of any incumbrances or convey the same subject to any existing incumbrances. And to do any and all acts and to execute any and all papers, which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforcible by it and collectible with interest at the rate of 6% per annum, to be credited semi-annually, as a debit and charge against said real estate.

This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of a certain principal note of said grantor in the sum of Fourteen Thousand Dollars ($14,000.00) together with interest thereon and recorded in mortgage record 52, page 84 in the office of the Recorder of Hamilton County, Indiana.

In witness whereof, Said Dora E. Rooker and William V. Rooker, her husband have hereunto set their hands and seals this 11th day of October, 1909.

DORA E. ROOKER.
WILLIAM V. ROOKER.

509 STATE OF INDIANA,
Marion County, ss:

Before me the undersigned, Notary Public, personally appeared William V. Rooker and Dora E. Rooker, his wife and acknowledged the execution of this deed.

Witness my Hand and Notarial Seal this 11th day of October, 1909.

[Seal Notary Public, Indiana.]

WM. J. McCOY,
Notary Public.

My Commission expires July 23, 1910.

No. 8317. Paid. Deed. Dora E. Rooker & husband to Fidelity Trust Company, Trustee. Received for record the 14 day of Oct. A. D. 1909, at 8 o'clock A. M. Recorded in record 97, page 117. E. A. Mosbaugh, Recorder Hamilton County. Entered for taxation Oct. 14, 1909. N. W. Cowgill, Aud."

DEFENDANT'S EXHIBIT No. 2.

"*Deed.*

510 This indenture witnesseth, that William V. Rooker and Dora E. Rooker, husband and wife, of Hamilton County, State of Indiana, in consideration of One Dollar ($1.00) the receipt of which is hereby acknowledged and other good and valuable considerations by them had, convey and warrant to the Fidelity Trust Company of Indianapolis, Indiana, Trustee, the following real estate in Marion County, Indiana, to-wit:

The southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north range four (4) east containing forty (40) acres more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north range four (4) east containing forty (40) acres more or less.

To have and to hold said real estate, however, in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker and to protect and discharge the obligations of the trust therein with the powers and limitations as follows:—

Said Fidelity Trust Company, of Indianapolis, Trustee as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days' notice in writing, to be given to the

511 grantors by the trustee herein, the Trustee may publicly advertise said real estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such Trustee to execute the proper Trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed, that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do and any such purchaser or purchasers shall in no wise be responsible for the applications of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, Trustee, on this date.

The said Fidelity Trust Company of Indianapolis, as such Trustee shall have full power and authority to make contacts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforcible in its hands, together with interest thereon at the rate of 6% per annum, to be pedited semi annually, to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described. This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed March 3, 1909 by the grantors William V. Rooker and Dora E. Rooker, husband and wife to Indianapolis Life Insurance Company to secure the payment of one (1) principal note of the sum of Six Thousand Dollars ($6,000.00) and interest coupon notes thereon, which mortgage is recorded in mortgage record 523 page 128 in the office of the Recorder of Marion County, State of Indiana.

In witness whereof: Said William V. Rooker and Dora E. Rooker have hereunto set their hands and seals this 11th of October, 1909.

WILLIAM V. ROOKER.
DORA E. ROOKER.

STATE OF INDIANA,
Marion County, ss:

Before me the undersigned, Notary Public, personally appeared William V. Rooker and Dora E. Rooker, husband and wife, and acknowledged the execution of this deed.

Witness my Hand and Notarial Seal this 11th of October, 1909.

[Seal Notary Public, Indiana.]

WM. J. McCOY,
Notary Public.

My Commission expires July 23, 1910.

Fidelity Trust Co. Deed. 18862. Wm. V. Rooker & Wife to Fidelity Truts Co. Trustee. Received for record at 12 O'clock M. Oct. 14, 1909, and recorded in Record 52 page 101. Harry R. Wallace. Duly entered for taxation Oct. 14, 1909. Albert Sahm, Auditor Marion Co."

Q. Mr. Fogarty, I hand you——

(By the Court:) I intend to admit these vouchers, do you have any objection?

(By Mr. Rooker:) These vouchers, as I read them, show a personal obligation; they are not, in substance or in form the voucher that they pleaded in evidence; if they had pleaded these Exhibits without this clause, we would not have pleaded the non est
514 factum against the vouchers.

(By the Court:) I think, under the pleadings, the vouchers are competent.

Q. I hand you now——

(By the Court:) With my statement, do you want to make your objection to the first voucher, you know what they are?

(By Mr. Rooker:) Now, here, your Honor, they have this clause written in this, that this becomes a draft on the Fidelity Trust Company; now in the papers that are signed that does not appear; that makes it a promissory note.

(By the Court:) If you want to go into all these you may do so; I am going to admit the vouchers, you may take your exception.

(By Mr. Rooker:) All respect to this Court, I ask the Court to make a record showing a reserved question of fact, so we can show the variance between the vouchers as pleaded.

Q. Mr. Fogarty, I hand you a voucher which has been marked for identification Defendant's Exhibit No. 3; you may look at that and state, first, who executed that voucher?

A. Dora E. Rooker.

Q. You may look at the signature and tell the Court whether or not that is the signature of Dora E. Rooker?

The plaintiffs, by counsel, object to that for the reason the
515 instrument now shown to the witness is not the instrument pleaded as an Exhibit in their Counter-claim, there being a variance to the effect that the instrument pleaded in their counter-claim and on which they are entitled to judgment here, shows that the instrument has the qualities of a promissory note, and on which they would be entitled to a personal judgment against Dora E. Rooker, if the pleadings were filed.

(By Mr. Seyfried:) I will strike that clause out of the Exhibits pleaded.

Q. Are you acquainted with the signature of Dora E. Rooker, Mr. Fogarty?

A. Yes.

Q. Now you may look at that voucher and state whether or not that voucher bears the signature of Dora E. Rooker?

A. Yes.

Q. You may state whether or not that voucher was presented to the Fidelity Trust Company?

A. Yes.

Q. And whether or not the Fidelity Trust Company paid to the party in whose favor that voucher is drawn the amount of money therein specified, namely, sixty dollars?

The plaintiffs, by counsel, object to that for the reason that there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is Trustee; that this Exhibit is now offered by the Fidelity Trust Company as Trustee
516 in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them, and therefore is not evidence in favor of either of them.

Stipulation.

The plaintiffs, by counsel, reserving their objection that the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as Trustee are not lawfully entitled, together and as having a common interest under this trust agreement, to introduce in evidence these vouchers under the issues in this case, saving with the exception it is stipulated and agreed that the vouchers show payments to have been made at the dates and in the sums, and the payee following, to-wit:

By Mr. C. S. Cox: The Fidelity Trust Company is in this court only in one capacity, and that is as Trustee; the Fidelity Trust Company is making no claim except as Trustee under these instruments, and we do not want a lot of stuff in this record confusing things, injecting things in this case that is not there.

(By Mr. W. V. Rooker:) Will you dismiss your case other
517 than as to the Trust Company?

(By Mr. Henry Seyfried:) The Trustee had no funds; the funds that were advanced were the funds of the corporation; that is the only thought that is in mind in this case, to bring to the attention of the Court is, that the principal of this trust furnished, we got no funds, no capital, and that the capital was taken from the corporate treasury of the Trustee.

The court overrules the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception. And the stipulation stays in the record.

The defendant, by counsel, then introduced in evidence and read to the court 49 vouchers, which have been marked by the reporter for identification as Defendant's Exhibit No. 3, and which vouchers are in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 3.

"The Fidelity Trust Company of Indianapolis to Indianapolis Mortar Fuel Co., Dr.

Monthly Invoice.

518 Indianapolis Mortar & Fuel Co., Indianapolis,

Dealers in Fuel, Building Material.

Sold to W. V. Rooker, Noblesville, Ind.

Terms: Net cash — days Prices subject to change without notice.

Date.		Dr.	Cr.
Sep. 10 09.	50 Brl. Lehi Cement Paper @ 1.20..	60.00	

Rec. Payment.

INDIANAPOLIS MORTAR & FUEL CO.,
By W. H. WHITTAKER,
Treas.

Approved for payment this 13 day of Oct. 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., —— —, 190-.

Received of The Fidelity Trust Company, on the above order of Dora E. Rooker the sum of Sixty Dollars in full settlement of the above account.
$60.00.

INDIANAPOLIS MORTAR & FUEL CO.,
By W. H. WHITTAKER,
Treas.

Voucher No. —. $60.00.
Paid Oct. 13, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to Balke & Krauss Co., Dr.

1909, Oct. 13, to part payment on contract, $1,000.00.

519 Approved for payment this 13th day of October 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Oct. 13, 1909.

Received of The Fidelity Trust Company, on the above order of Dora E. Rooker the sum of One Thousand Dollars in full settlement of the above account.

$1,000.00. BALKE & KRAUSS CO.
H. H. SCHULZ,
Treas.

Voucher No. —. $1,000.00.
Paid Oct. 13, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to W. H. Johnson & Son Co., Dr.

1909, Oct. 13. On contract, $400.00.

Approved for payment this 14th day of October 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Oct. 14", 1909.

Received of the Fidelity Trust Company, on the above order of Dora E. Rooker the sum of Four Hundred Dollars in full settlement of the above account.

$400.00 W. H. JOHNSON & SON CO
R. A. SHIRLEY,
Secy.

Voucher No. —. $400.00.
Paid Oct. 14, 1909. Fidelity Trust Co."

520 "The Fidelity Trust Company of Indianapolis, Trustee for Dora E. Rooker, to Fidelity Trust Co., Dr.

1909, Oct. 14, to collateral loan of W. V. Rooker, due October 16", 1909, 350.00.

Approved for payment this 16 day of October 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Oct. 16, 1909.

Received of The Fidelity Trust Company, the sum of Three hundrey & fifty Dollars in full settlement of the above account.

$350.00.
FIDELITY TRUST COMPANY,
By THOMAS B. FULMER,
Secretary-Treasurer.

Voucher No. — . $350.00.
Paid Oct. 16, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis, Trustee for Dora E. Rooker, to Fidelity Trust Co., Dr.

1909, Oct. 16, to Collateral Loan of Wm. V. Rooker, due October 17", 1909, & Interest, 300.75.

Approved for payment this day of October 16, 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

521 Indianapolis, Ind., Oct. 16, 1909.

Received of The Fidelity Trust Company, the sum of Three hundred 75/100 Dollars in full settlement of the above account.
$300.75.

FIDELITY TRUST COMPANY,
By THOMAS B. FULMER,
Secretary-Treasurer.

Indianapolis, Ind., Oct. 2, 1909.

Received of Fidelity Trust Co. Three Hundred Dollars. As a second advancement to the Dora E. Rooker and W. V. Rooker Trust; said first advancement being of $350.00 for which note is on deposit with said Fidelity Trust Co., each of said advancements being for the purpose of paying labor and material bills to the benefit of Dora E. Rooker in construction of new house.
$300.00.

DORA E. ROOKER.

Voucher No. —. $300.75.
Paid Oct. 16, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to Pay Roll and Sundry Items, Dr.

1909, Oct. 16, to account pay roll and sundries $300.00.
Approved for payment this 16th day of October 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., 10/16, 1909.

Received of The Fidelity Trust Company, the sum of Three hundred dollars in full settlement of the above account.
522 $300.00. DORA E. ROOKER.
T. B. F.

Voucher No. —. $300.00.
Paid Oct. 16, 1909 Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to Pay Roll & Sundries upon Receipt of W. V. Rooker. Dr.

1909, Oct. 22, to pay roll & sundries acct. house, 350.00.
Approved for payment this 22 day of October 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Oct. 22, 1909.

Received of The Fidelity Trust Company, on the above order of Dora E. Rooker the sum of Three Hundred Fifty and no/100 Dollars in full settlement of the above account.
$—. W. V. ROOKER.
Paid Oct. 22, 1909. Fidelity Trust Co.
Voucher No. —. $350.00."

"The Fidelity Trust Company of Indianapoils, Trustee for Dora E. Rooker, to Pittsburg Plate Glass Co., Dr.

523 1909, Oct. 30, to balance as per contract for glass on house, $265.00.
Approved for payment this 30 day of October 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Nov. 9, 1909.

Received of The Fidelity Trust Company, on the above order of Dora E. Rooker the sum of Two Hundred Sixty-five Dollars in full settlement of the above account.
$265.00. PITTSBURGH PLATE GLASS CO.,
Per E. A. DUNN.

Paid Nov. 9, 1909. Fidelity Trust Co.
Voucher No. —. $265.00.
Paid Nov. 9, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to W. R. Evans & Co., Dr.

Acct. Dora E. Rooker.

1909, Nov. 9, to erecting & constructing Stairways in Mrs. Rooker's residence under Balke Krauss contract, 73.00.
Approved for payment this 9th day of November 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Nov. 10, 1909.

Received of The Fidelity Trust Company, the sum of Sev-
524 enty three Dollars in full settlement of the above account.
$73.00. WM. R. EVANS & CO.

Voucher No. —. $73.00.
Paid Nov. 12, 1909. Fidelity Trust Co.
Pay to the order of Union National Bank, Indianapolis, Ind.
Foster Lumber Co. Union National Bank.
Paid Nov. 12, 1909. R. T. Indianapolis, Ind."

"The Fidelity Trust Company of Indianapolis to Dora E. Rooker
on Acct. Daniel Stewart Company, Paints, etc., Dr.

1909, Nov. 17, to account in full for paints, oils, etc., furnished in the erection & construction of dwelling house, $60.88.
Approved for payment this 17 day of November 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Nov. 17, 1909.

Received of The Fidelity Trust Company, on account Dora E.
Rooker the sum of Sixty and 88/100 Dollars in full settle-
525 ment of the above account.
$60.88. DANIEL STEWART CO.,
Per L. H. SPAFFORD.

Paid Nov. 17, 1909. Fidelity Trust Co.
Voucher No. —. $60.88.
Paid Nov. 17, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis, Trustee for Dora E.
Rooker, to William V. Rooker, Dr.

1909, Nov. 27, to pay roll, sundry, brick, etc., 100.00.
Approved for payment this 27" day of November 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Nov. 27", 1909.

Received of The Fidelity Trust Company, Trustee for Dora E. Rooker, the sum of One hundred Dollars in full settlement of the above account.
$100.00. WILLIAM V. ROOKER.

Paid Nov. 27, 1909. Fidelity Trust Co.
Voucher No. —. $100.00.
Bill of Wm. V. Rooker on account of Dora E. Rooker Trustee-ship.
Paid Nov. 27, 1909. Fidelity Trust Co."

526 "The Fidelity Trust Company of Indianapolis to Pay Roll and Sundries, Lime, etc., Dr.

Acct. Dora E. Rooker.

1909, Dec. 4, to farm pay roll, sundries on house, lime, etc., $85.00.

Approved for payment this 4 day of December 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 4, 1909.

Received of The Fidelity Trust Company in full above item the sum of Eighty Five Dollars in full settlement of the above account.
$85.00. W. V. ROOKER.

Paid Dec. 4, 1909. Fidelity Trust Co.
Voucher No. —. $85.00.
Paid Dec. 4, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to Humphreys & Sargent, Contractors for Tin Work on Dora E. Rooker Residence, Dr.

Acct. Dora E. Rooker.

1909, Nov. 24 Acct. tin work on residence, $400.00.
Approved for payment this 24 day of November 1909.
DORA E. ROOKER.

527 Please sign receipt and present at this office for payment.

Indianapolis, Ind., Nov. 30, 1909.

Received of The Fidelity Trust Company, Trustee for Dora E. Rooker the sum of Four hundred Dollars in full settlement of the above account.

$400.00.

HUMPHREYS AND SARGENT.
By D. HUMPHREYS.

Paid Nov. 29, 1909. Fidelity Trust Co.
Voucher No. —. $400.00.
Paid Nov. 29, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to Wm. V. Rooker,
Acct. Pay Roll on Dora E. Rooker Farm. Dr.

On Account Dora E. Rooker.

1909, Dec. 11, to farm pay roll, 45.00.

Approved for payment this 10 day of December, 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 10, 1909.

Received of The Fidelity Trust Company, Forty-five Dollars in full settlement of the above account. In full above claim.
$—.
WM. V. ROOKER.

528 Paid Dec. 11, 1909. Fidelity Trust Co.
Voucher No. —. $45.00.
Bill of — on account of D. E. Rooker.
Paid Dec. 11, 1909. Fidelity Trust Co.

"The Fidelity Trust Company of Indianapolis to Western Brick Company, Dr.

Acct. Dora E. Rooker.

1909, Dec. 10, to 2 M brick furnished for residence of Dora E. Rooker @ $10.00 per thousand, $20.00.

Approved for payment this — day of ——, 190-.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 15, 1909.

Received of the Fidelity Trust Company, on account Dora E. Rooker the sum of Twenty Dollars in full settlement of the above account.
$20.00.
WESTERN BRICK CO.,
W. C. RANKIN, *Sec'y.*

Paid Dec. 16, 1909. Fidelity Trust Co.
American National Bank. Paid Dec. 16, 1909.
529 Voucher No. —. $20.00.
Bill of Western Brick Co. on account of Dora E. Rooker.
Paid Dec. 16, 1909. Fidelity Trust Co.
American National Bank. Paid Dec. 16, 1909.
Western Brick Co. W. C. Rankin, Secy.

Pay American Nat'l Bank, Indianapolis, or order. (Prior Endorsements Guaranteed.) Second National Bank, Danville, Ills. A 90. A. R. Samuel, V. Pres. & Cash."

"The Fidelity Trust Company of Indianapolis to Wm. V. Rooker, Acct. Maintenance Farm for Pay Roll, Dr.

Acct. Dora E. Rooker.

1909, Dec. 18, to weekly pay roll farm labor, 25.00.

Approved for payment this 18 day of December, 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 18, 1909.

Received of The Fidelity Trust Company, acct. Dora E. Rooker trust the sum of Twenty-five Dollars in full settlement of the above account.
$25.00.

WM. V. ROOKER.

Voucher No. —. $25.00.
Paid Dec. 18, 1909. Fidelity Trust Co."

530 "The Fidelity Trust Company of Indianapolis to W. V. Rooker for Farm Pay Roll, Dr.

Acct. Dora E. Rooker Trust.

1909, Dec. 24, to pay roll farm maintenance week ending Dec. 25, 35.00.

Approved for payment this 24th day of Dec., 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 24, 1909.

Received of The Fidelity Trust Company, acct. Dora E. Rooker Trust the sum of Thirty-five Dollars in full settlement of the above account.
$—.

W. V. ROOKER.

Paid Dec. 24, 1909. Fidelity Trust Co.
Voucher No. —. $35.00.
Paid Dec. 24, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to W. V. Rooker
Acct. Pay Roll Dora E. Rooker Farm, Dr.

Acct. Dora E. Rooker Trust.

1909, Dec. 30, to W. V. Rooker Farm pay roll ending Jan. 1, 1910, $25.00.

Approved for payment this 31 day of December, 1909.
531 DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 31, 1909.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker trust, the sum of Twenty five Dollars in full settlement of the above account.
$25.00.

W. V. ROOKER.

Paid Dec. 31, 1909. Fidelity Trust Co.
Voucher No. —. $25.00.
Bill of —— —— on account of Dora E. Rooker.
Paid Dec 31 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to Lilly & Stalnaker.
Acct. Hardware Dora E. Rooker Residence, Dr.

Acct. Dora E. Rooker.

1909, Dec. 31, to Lilly & Stalnaker Acct. Hardware furnished in the Dora E. Rooker residence, $300.00.

Approved for payment this 31 day of December 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 31, 1909

Received of The Fidelity Trust Company, Acct. Dora E.
532 Rooker the sum of Three Hundred Dollars on a/c.
$300.00.

LILLY & STALNAKER.
V.

Paid Dec. 31, 1909. Fidelity Trust Co.
Voucher No. —. $300.00.
Bill of Lilly & Stalnaker on account of Dora E. Rooker.
Paid Dec. 31, 1909. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to W. H. Johnson & Son Co., Bal. in Full Heating Plant Dora E. Rooker residence, Dr.

Acct. Dora E. Rooker Trust.

1909, Dec. 31, to balance in full heating system Dora E. Rooker residence, $400.00.

Approved for payment this 31 day of December, 1909.

DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 31, 1909.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker trust, the sum of Four Hundred Dollars in full settlement of the above account.

$400.00.

W. H. JOHNSON & SON CO.
RICHARD A. SHIRLEY,
Secy.

Paid Jan. 4, 1920. Fidelity Trust Co.

533 Voucher No. —. $400.00.

Bill of W. H. Johnson Son & Co. on account of Dora E. Rooker.

Paid Jan. 4 1910. Fidelity Trust Co.

Pay to Union National Bank, Indianapolis, Ind., or order. W. H. Johnson & Son Co. (Union National Bank) Indianapolis, Ind., Paid Jan. 4, 1910. R. T.

"The Fidelity Trust Company of Indianapolis to W. H. Johnson & Son Co. to Correction of Error on Account Final Settlement and in Full All Demands, Dr.

Account Dora E. Rooker Trust.

1910, Jan. 6, to W. H. Johnson & Son Co. for correction of error made in final and full settlement for Heating plant in the residence of Dora E. Rooker near Noblesville, Ind., $50.00.

Approved for payment this 6 day of January 1910.

DORA E. ROOKER.

534 Please sign receipt and present at this office for payment.

Indianapolis, Ind., January 6, 1910.

Received of The Fidelity Trust Company, on account Dora E. Rooker trust the sum of Fifty Dollars in full settlement of the above account.

$50.00.

W. H. JOHNSON & SON CO.
RICHARD A. SHIRLEY,
Sec'y-Treas.

Paid Jan. 6, 1910. Fidelity Trust Co.
Voucher No. —. $50.00.
Bill of W. H. Johnson Son & Co. on account of Dora E. Rooker.
Paid Jan. 6, 1910. Fidelity Trust Co."

"The Fidelity Trust Company of Indianapolis to W. V. Rooker on Account Farm Pay Roll on the Dora E. Rooker Farm, Dr.

Account Dora E. Rooker Trust.

1910, Jan. 15. To W. V. Rooker to farm pay roll for week ending Jan. 15, 1910	$35.00
Total	35.00

Approved for payment this 15 day of January 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Jan. 15, 1910.

Received of The Fidelity Trust Company, Account Dora
535 R. Rooker Trust the sum of Thirty Five Dollars in full settlement of the above account.

$35.00. W. V. ROOKER.

Paid Jan. 15, 1910. Fidelity Trust Co.
Voucher No. —. $35.00.
Bill of W. V. Rooker on account of Dora E. Rooker.
Paid Jan. 15, 1910. Fidelity Trust Co.

"The Fidelity Trust Company of Indianapolis to Payment of Certain Notes Herein Designated on Account of the Dora E. Rooker Trust, Dr.

Account Dora E. Rooker Trust.

One note $100.00	dated	Nov. 6, 1909	for	ninety	days.
One note $507.50	"	Oct. 26, 1909	"	"	"
One note $100.00	"	Nov. 13, 1909	"	"	"
One note $125.00	"	Nov. 1, 1909	"	"	"
Total, $832.50					

The above notes represent monies paid by me for labor and material in the construction of my residence, and for labor and supplies in the maintenance and upkeep of my farm.

Approved for payment this 31st day of January 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

536 Indianapolis, Ind., Jan. 31, 1910.

Received of The Fidelity Trust Company, Trustee for Dora E. Rooker the sum of Eight Hundred Thirty Two and 50/100 Dollars in full settlement of the above account.
$832.50

DORA E. ROOKER.
By W. V. ROOKER,
Her Agent.

Paid Jan. 31, 1910. Fidelity Trust Co.

418.72 to bal. $6,000. Trust Agreement to "Suspense" a/c.
413.78 a/c Advancement a/c Trust " " "Trust" "

832.50

Voucher No. —. $832.50.
Bill of —— —— on account of Dora E. Rooker Trust."

"The Fidelity Trust Company of Indianapolis to W. V. Rooker on Account Expense in Operating Farm to Feby. 1, 1910. Dr.

Acct. Dora E. Rooker Trust.

1910. Jan. 31. to expenses operating farm to Feby. 1, 1910. 65.00.

10

Approved for payment this 31 day of January 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Jan. 31, 1910.

Received of The Fidelity Trust Company, Sixty-Five Dollars on account Dora E. Rooker Trust in full settlement of the above account.
537 $65.00.

W. V. ROOKER.

Paid Jan. 31, 1910. Fidelity Trust Co.
Voucher No. —. $65.00.
Bill of —— —— on account of Dora E. Rooker.

"The Fidelity Trust Company of Indianapolis to W. V. Rooker, Account Pay Roll on Farm and for Carpenter Work on House, Dr.

Acct. Dora E. Rooker Trust.

1910, Feby. 16.	To farm pay roll to date.....	26.00
Feby. 20.	To carpenter work on house.....	24.00
		50.00

Approved for payment this 15 day of February 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Feby. 15, 1910.

Received of The Fidelity Trust Company, account Dora E. Rooker trust the sum of Fifty Dollars in full settlement of the above account.
$50.00. DORA E. ROOKER.
By W. V. ROOKER.
Her Agt.

Paid Feb. 15, 1910. Fidelity Trust Co.

Voucher No. —. $50.00.
Bill of W. V. Rooker on account of Dora E. Rooker."

538 "The Fidelity Trust Company of Indianapolis to Hetherington & Berner in Full Structural Iron Work Dora E. Rooker Residence, Dr.

Acct. Dora E. Rooker Trust.

1910, Feb'y 25, to Hetherington & Berner in full for structural iron work Dora E. Rooker residence, $182.65.

Approved for payment this 25 day of February 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Feb'y 25, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of One Hundred Eighty Two and 65/100 Dollars in full settlement of the above account.
$182.65.
HETHERINGTON & BERNER.
Per RINKER.

Paid Feb. 28, 1910. Fidelity Trust Co.

Voucher No. —. $182.65.

Pay to the order of The Indiana National Bank of Indianapolis, Ind. Hetherington & Berner. O. F. Hetherington, Treas.
Paid Feb. 26, 1910. Indiana National Bank, 2nd Asst. Rec'ving Teller."

539 "The Fidelity Trust Company of Indianapolis to Stewart-Carey Glass — in Full Balance Account for Glass Dora E. Rooker Residence, Dr.

Acct. Dora E. Rooker Trust.

1910, Feby. 25, to Stewart-Carey Glass Company balance in full glass furnished Dora E. Rooker residence, $2.66.

Approved for payment this 25 day of February 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Feby. 25, 1910.

Received of The Fidelity Trust Company, acct. Dora E. Rooker Trust the sum of Two and 66/100 Dollars in full settlement of the above account.
$2.66.

STEWART-CAREY GLASS CO.
ALEX BARRY,
Secretary.

Paid Feb. 28, 1910. Fidelity Trust Co.
Voucher No. —. $2.66.

Pay to the order of The Fletcher National Bank, Indianapolis, Ind. Stewart-Carey Glass Co.
L. Paid Feb. 28, 1910. Z. Fletcher National Bank."

540 "The Fidelity Trust Company of Indianapolis to W. V. Rooker in Full Pay Roll for Maintenance Dora E. Rooker Farm to March 1, 1910, Dr.

Acct. Dora E. Rooker Trust.

1910, Feby. 28, to pay roll for maintenance of Dora E. Rooker farm to date, $45.00.

Approved for payment this 28 day of Feby. 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Feby. 28, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker trust the sum of Forty Five Dollars in full settlement of the above account.

$45.00. DORA E. ROOKER,
By W. V. ROOKER,
Her Agent.

Paid Mar. 1, 1910. Fidelity Trust Co.
Voucher No. —. $45.00.

"The Fidelity Trust Company of Indianapolis to W. V. Rooker, as Agent for Dora E. Rooker and on Acct. of the Dora E. Rooker Trust for Farm Maintenance. Dr.

Acct. Dora E. Rooker Trust.

541 1910, Mar. 31, to farm pay roll for last two weeks ending this date, $62.50.

Approved for payment this 31 day of March 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Mar. 31, 1910.

Received of the Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Sixty two and 50/100 Dollars in full settlement of the above account.

$62.50. DORA E. ROOKER,
By W. V. ROOKER,
Agent.

Paid Mar. 31, 1910. Fidelity Trust Co.
Voucher No. —. $62.50.
Bill of —— —— on account of Rooker."

"The Fidelity Trust Company of Indianapolis to Leroy J. Patty, Clerk Hamilton Circuit Court of Indiana, in Pay't Prin., Int. & Costs in Cause No. 15306, Pinnell, etc., Co. vs. Rooker et al., Dr.

Account Dora E. Rooker Trust.

1910, April 7.	To Leroy J. Patty clerk in payment prin. & interest judgment of Pinnell Dulin Co. v. Dora E. Rooker et al. on foreclosure		
542	mechanics' lien in cause No. 15306 on release of lien.....	$381.48	
	To costs in full in above cause.....	3.15	
	Total		384.63

Approved for payment this 7 day of April 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., April 7, 1910.

Received of The Fidelity Trust Company, Account Dora E. Rooker Trust the sum of Three Hundred Eighty Four and 63/100 Dollars in full settlement of the above account.

$384.63.

LEROY J. PATTY,
Clerk Hamilton Circuit Court.

Paid Apr. 9, 1910. Fidelity Trust Co.
Voucher No. —. $384.63.
Bill of —— —— on account of Dora E. Rooker.
Paid Apr. 9, 1910. Fidelity Trust Co."

The plaintiffs, by counsel, except to the introduction in evidence of the above voucher calling for $384.63.

"The Fidelity Trust Company of Indianapolis to W. V.
543 Rooker for Farm Pay Roll Dora E. Rooker Farms Two Weeks Ending April 16th, 1910, Dr.

Account Dora E. Rooker Trust.

1910, April 15, to pay roll on farms two weeks ending April 16, $62.50.

Approved for payment this 15 day of April 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., April 15, 1910.

Received of The Fidelity Trust Company, Account Dora E. Rooker Trust the sum of Sixty Two and 50/100 Dollars in full settlement of the above account.

$62.50.

DORA E. ROOKER,
By W. V. ROOKER,
Her Agent.

Paid Apr. 15, 1910. Fidelity Trust Co.
Voucher No. —. $62.50.

"The Fidelity Trust Company of Indianapolis to Balke and Krauss Co. a/c Material Furnished for Dora E. Rooker Residence Near Noblesville, Dr.

Acct. Dora E. Rooker Trust.

1910, Mch. 17, to balance on a/c except undelivered part of contract, $2,595.23.

Approved for payment this 18th day of April 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

544 Indianapolis, Ind., April 19, 1910.

Received of The Fidelity Trust Company, Trustee Dora E. Rooker the sum of Twenty Five Hundred Ninety Five 23/100 Dollars in full settlement of the above account.
$2,595.23. BALKE & KRAUSS CO.
H. H. SCHULZ,
Treas.

Paid Apr. 19, 1910. Fidelity Trust Co.
Voucher No. —. $—.

Bill of Balke & Krauss Co.

Indianapolis, Ind., Apr. 12, 1910.

M-. W. V. Rooker, Noblesville, Ind., Bought of Balke & Krauss Co. (Incorporated).

Lumber, Lime, and Coal.

Planing Mill.

Lath, White Sand, Cement, Plaster, Hair, Flue Linings, Sewer and Flue Pipe, Fire Brick and Clay.

Office and Yards, Cor. Market and Missouri Streets.
Terms, Cash.
Both Phones 1081.

1	Partition in Basement 16′ 6 x 5′	16.00
	Porch Columns	300.00
260 feet 6″ sewer pipe 4 pcs. 6″ Ells 3 " 6″ Y's & T's		23.00
	Freight	17.00
		356.00

The above material to be furnished on the Rooker job at Noblesville, Ind.

BALKE & KRAUSS CO.
H. H. SCHULZ.
Treas.

Apr. 12, 1910.

545 Balke & Krauss Co., Indianapolis, Ind.

Terms, Cash.

Sold to W. V. Rooker for Dora E. Rooker, Noblesville, Ind.

March 16/1909.		To Mill work contract		2,855.00
April	7/09.	5,000′ 6″ #1 Com vP flg	23.00	115.00
		1,499′ 6″ Lining	17.50	26.23
April	7.	42 M 32″ W. P. Lath	1.45	60.90
	10.	20 pcs. 4 x 4 4′ 107′ #1 Pop. sls	.10	10.70
	17.	16,019′ 6″ #1 Com. vP flg. (car A. C. L. #24470) *6a* 21.00	336.40	
		Less freight	85.30	
				251.10
	27.	24 M 32″ #1 W. P. Lath	1.45	34.80
May	8.	60 Bu. Manilla fibre	.16	9.60
May	10	400 Bu. H. Lime	19½	78.00
		1 ton Mich Plaster 25 paper sacks		9.00
July	10.	2 M 32″ Lath	1.45	2.90
April	12.	20¼ dozen sash pullies		19.27
June	10.	12 Box columns 6 x 6 3′ 9″	2.00	24.00
		6 Bundles top rail for deck 99′	.10	9.90
		6 bundles Bot. rail for deck 99′	.8	7.92
		252 turned Baluster	.12	30.24
July	10.	2 set- door casing 2′9 x 6′9½	1.75	3.54
546				
		1 transom 2′9 x 16 1 lt. 1¾ plain oak		1.00
		1 Ins. Dr. fr. 2′9 x 6′ 9½		3.00
		1 door frame 14½ x 6		2.00
		2 set- casings for same		3.00
		8 veranda rails 7′ 10″		4.48
	19.	8 columns 6 x 6 33½″	2.00	16.00
	24.	1 door 2′9 x 6′ 9½		9.00
		Deff bet. 1 pl. Dr. & mirror den 2′9 x 6′ 9½		2.00
Augt.	4.	Splicing 39 door frames	.20	7.80
		" 50 Wne "	.15	7.50
	17.	3 pcs. moulding		.50

Contract on porch columns outside			300.00
260 fr. 6″ Pipe, 1 pcs. 6″ Ells, 2 pcs. 6″ Y's, 1 pc. 6″ Tee			23.35
Freight			17.00
			3,944.69
Cr. By 1 post 6 x 6 3′		2.00	
2½ posts 3 x 6 x 3	1.00	2.00	
4 shelves ⅞ x 18½ 5′ 7″ 9′	7	.63	
4 fr. top & Bot. rail		4.48	
			9.11
			3,935.58
Oct. 13/09. Cr. By Cash			1,000.00
			2,935.58

547 STATE OF INDIANA,
County of Marion, ss:

H. H. Schulz being duly sworn says that he is the Secretary and Treasurer of the Balke & Krauss Co. a corporation organized under the laws of Indiana; that the foregoing account for $2,935.58 against William V. Rooker is correct, and that the same is due and unpaid; that all of the articles enumerated in said account have been furnished for the house and improvements now being erected by said Rooker at Noblesville, Hamilton County, Indiana and to secure the payment of which a lien has been filed with the Recorder of Hamilton County, Indiana; that all of the items of merchandise stated in said account have been already delivered to said Rooker except a small portion thereof, which have not been furnished because they have not been called for, and which said remaining merchandise said Balke & Krauss Co. agrees to deliver on demand.

H. H. SCHULZ.
Secy. & Treas.

Subscribed and sworn to before me this 25th day of March 1910.

FLORENCE S. YORK, [SEAL.]
Notary Public.

My commission expires June 9, 1913.

STATE OF INDIANA,
Hamilton County, ss:

William V. Rooker on his oath says that he makes this affidavit for and in behalf of Dora E. Rooker and that as to the items installed the amount bill is true & correct; that as to the items not installed he is informed and believes the work is substantially ready for
548 delivery and in that respect that the bill is true and correct but that the said Dora E. Rooker reserves the right to require Balke & Krauss Co. to correct any errors or omissions that may be

found in the work not installed; that with this proviso the amount owing is as stated in the bill and the sum is a lien and charge against Dora E. Rooker real estate.

WILLIAM V. ROOKER.

Subscribed and sworn to before me his April 4, 1910.

[Seal Hamilton Circuit Court, Indiana.]

LE ROY J. PATTY,
Clerk.

"The Fidelity Trust Company of Indianapolis to W. V. Rooker, Agent, Account Dora E. Rooker Trust, Dr.

Account Dora E. Rooker Trust.

1910, April 29, to farm pay roll, Maintenance of farms for two weeks ending April 30th, $62.50.

Approved for payment this 29 day of April 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., April 29, 1910.

Received of The Fidelity Trust Company Account Dora E. Rooker Trust the sum of Sixty Two and 50/100 Dollars in full settlement of the above account.
549 $62.50.

W. V. ROOKER,
Agent.

Paid Apr. 29, 1910. Fidelity Trust Co.
Voucher No. —. $62.50.
Bill of —— —— on account of Dora E. Rooker."

"The Fidelity Trust Company of Indianapolis to Wm. V. Rooker, Agent, for Dora E. Rooker Farm Maintenance Account, Dora E. Rooker Trust, Dr.

Account Dora E. Rooker Trust.

1910, May 11, to Wm. V. Rooker on account pay roll for the two weeks ending May 16, $62.50.

Approved for payment this 11 day of May 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., May 11, 1910.

Received of The Fidelity Trust Company, on account Dora E. Rooker Trust the sum of Sixty Two and 50.100 Dollars in full settlement of the above account.
$62.50.

WILLIAM V. ROOKER,
Agent.

Paid May 11, 1910. Fidelity Trust Co.
Voucher No. —. $62.50."

550 "The Fidelity Trust Company of Indianapolis to W. V. Rooker Account Pay Roll Farm Maintenance to June 1 1910, Dr.

Dora E. Rooker Trust.

1910, May 28, to Pay Roll for Maintenance for the two weeks ending June 1, 1910, $62.50.

Approved for payment this 28th day of May 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., May 28, 1910.

Received of The Fidelity Trust Company, the sum of Sixty Two and 50/100 Dollars in full settlement of the above account.
$62.50.

W. V. ROOKER.

Paid May 28, 1910. Fidelity Trust Co.
Voucher No. —. $62.50.
Bill of —— —— on account of Dora E. Rooker."

"The Fidelity Trust Company of Indianapolis, Trustee, to Dora E. Rooker Trust, Dr.

1910, June 15.

	For labor on house, finishing porches	$50.00
551	Two extra men on pay roll on farm work @ $18.00 each	36.00
	Regular pay roll	62.50
		148.50

Approved for payment this 15th day of June 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., June 15, 1910.

Received of The Fidelity Trust Company, the sum of One Hundred Forty Eight and 50/100 Dollars in full settlement of the above account.

W. V. ROOKER.

$148.50.
Paid Jun. 15, 1910. Fidelity Trust Co.
Voucher No. —. $148.50.
Bill of Dora E. Rooker on account of Dora E. Rooker."

"The Fidelity Trust Company of Indianapolis to W. V. Rooker in Full to Date Farm Pay Roll Account Farm Maintenance, Dr.

Acct. Dora E. Rooker Trust.

1910, June 30, to farm pay roll for the two weeks ending July 1, 1910, $130.00.
Approved for payment this 30 day of June 1910.

DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., June 30, 1910.

Received of The Fidelity Trust Company, Acct. Dora E
552 Rooker Trust the sum of One Hundred and Thirty Dollars
full settlement of the above account
$130.00.

W. V. ROOKER.

Paid Jun. 30, 1910. Fidelity Trust Co.
Voucher No. —. $130.00."

"The Fidelity Trust Company of Indianapolis to Kane & Kane, Attys. of Danl. I. Neher, Pltff. in Neher V. Rooker et al., No. 15084, Hamilton Circuit Court, Dr.

Acct. Dora E. Rooker Trust.

1910, June 24, to payment in full principal interests and Atty. fees judgment and on release of Mechanics' lien in the cause of Daniel I. Neher v. Dora E. Rooker et al. No. 15084 in the Hamilton Circuit Court of Indiana, $325.00.

Approved for payment this 24 day of June 1910.

DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., June 27", 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Three Hundred Twenty Five Dollars in full settlement of the above account.

553 $325.00. KANE & KANE.

Paid June 25, 1910. Fidelity Trust Co.
Voucher No. —. $325.00."

"The Fidelity Trust Company of Indianapolis to W. V. Rooker Account Harvest Expenses & Farm Maintenance on Dora E. Rooker Farms, Dr.

Acct. Dora E. Rooker Trust.

1910, July 15, to expenses harvesting fifty-five acres wheat and for farm labor and maintenance in full for the half month ending today, $220.00.

Approved for payment this 15 day of July 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., July 15, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker Trust the sum of Two Hundred twenty Dollars in full settlement of the above account.

W. V. ROOKER.

$—
Paid Jul. 19, 1910. Fidelity Trust Co.
Voucher No. —. $220.00."

554 "The Fidelity Trust Company of Indianapolis to Citizens State Bank, Noblesville, Indiana, on Account the Dora E. Rooker Trust, Dr.

Account Dora E. Rooker Trust.

1910, May 11, to Citizens State Bank of Noblesville, Indiana, the promissory notes for the principal amounts with six per cent interest additional to-wit:

One note June 22, 1909	$881.84
" " " 28, 1909	200.00
" " Aug. 7, 1909	300.00
	$1,381.84

Approved for payment this 11 day of May, 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Aug. 11, 1910.

Received of The Fidelity Trust Company, the sum of Fourteen hundred seventy-three & 76/100 Dollars in full settlement of the above account.

$1,473.76. CITIZENS STATE BANK.
E. S. BAKER, *Cash.*

Paid Aug. 11, 1910. Fidelity Trust Co.

Indianapolis, Ind., May 11, 1910.

This voucher is hereby accepted by the undersigned for
555 payment as of 90 days from the within date, viz., Aug. 9, 1910, as agreed with Shirts & Fertig, Attorneys for the Citizens State Bank, Noblesville, Indiana.

FIDELITY TRUST CO.,
By W. M. FOGARTY,
President.

Aug. 11, 1910.

Interest computed as follows:

$881.84—1 Yr. 50 days		52.91
		7.34
200.00—1 yr. 44 days		18.00
		1.47
300.00—1 yr. 4 days		18.00
		.20
1381.84	Int.	91.92
	Principal	1,381.84
		$1,473.76

Voucher No. —. $1,473.76.

Bill of Citizens State Bank of Noblesville on account of Dora E. Rooker.

$300.00.

Noblesville, Ind., Aug. 7, 1909.

On demand after date we, or either of us, promise to pay to the order of Citizens State Bank of Noblesville, Indiana, Three Hundred Dollars, with attorney fees and interest at the rate of eight per cent. per annum after maturity until paid. Negotiable and payable at Citizens State Bank, of Noblesville, Indiana, value received,
556 without any relief whatever from valuation and appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

DORA E. ROOKER.

P. O. . 21875. Dora E. Rooker. 300. Demand.

$200.00. Noblesville, Ind., Jun- 28, 1909.

On Call, after date we, or either of us, promise to pay to the order of Citizens State Bank of Noblesville, Indiana, Two Hundred Dollars, with attorney fees and interest at the rate of eight per cent. per annum after maturity until paid. Negotiable and payable at Citizens State Bank, of Noblesville, Indiana. Value received without any relief whatever from valuation and appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

DORA E. ROOKER.

P. O. —. 21578. Dora E. Rooker. 200 Demand.

$881.84. Noblesville, Ind., Jun- 22, 1909.

30 days after date we, or either of us, promise to pay to the order of Citizens State Bank of Noblesville, Indiana, Eight hundred eighty-one & 84/100 Dollars, with attorney fees and interest at the
557 rate of eight per cent. per annum after date, until paid. Negotiable and payable at Citizens State Bank, of Noblesville Indiana. Value received without any relief whatever from valuation and appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

DORA E. ROOKER.

P. O. —. 21546. Dora E. Rooker. 881.84. July 22, 09. In from date

Noblesville, Ind., Aug. 7, 1909.

The undersigned having this day applied to the Citizens State Bank for a loan of $300.00, for the purpose of inducing the said Bank to make said loan does now represent that the money so desired is for her sole and separate use, and solely for her benefit; that she is not thereby undertaking as the surety of her husband, and that said loan is not procured to secure the debt of her husband or any other person.

And on the faith of this representation, and not otherwise, the said Bank has this day made the said loan.

DORA E. ROOKER.

Noblesville, Ind., Jun- 22, 1909.

The undersigned having this day applied to the Citizen's State Bank for a loan of $881.84, for the purpose of inducing the said Bank to make said loan does now represent that the money so desired is for her sole and separate use, and solely for her bene-
558 fit; that she is not thereby undertaking as the surety of her husband, and that said loan is not procured to secure the debt of her husband or any other person.

And on the faith of this representation, and not otherwise, the said Bank has this day made the said loan.

DORA E. ROOKER.

Noblesville, Ind., Jun- 28, 1909.

The undersigned having this day applied to the Citizen's State Bank for a loan of $200.00 for the purpose of inducing the said Bank to make said loan does now represent that the money so desired is for her sole and separate use, and solely for her benefit; that she is not thereby undertaking as the surety of her husband, and that said loan is not procured to secure the debt of her husband or any other person.

And on the faith of this representation, and not otherwise, the said Bank has this day made the said loan

DORA E. ROOKER.

STATE OF INDIANA,
Hamilton County, ss:

Dora E. Rooker, on her oath says: That the proceeds of the following described notes, to-wit, June 22, 1909 for $881.84; June 28, 1909, for $200.00; August 7, 1909, for &300.00 executed by her to the Citizen's State Bank of Noblesville, Indiana, were applied wholly to the betterment tof her separate estate. And further affiant saith not.

DORA E. ROOKER.

Subscribed in my presence and sworn to before me this 3rd
559 day of March, 1910. Witness my hand and seal.

[Seal Notary Public, Indiana.]

EVA CARN,
Notary Public.

My commission expires October 24, 1910."

The plaintiffs, by counsel, object to the introduction in evidence of the voucher just read for the reason that there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is Trustee; that this Exhibit is now offered by the Fidelity Trust Company as Trustee in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them, and therefore is not evidence in favor of either of them.

The Court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

560 "The Fidelity Trust Company of Indianapolis to American Central Life Insurance Company, Dr.

Account Dora E. Rooker.

1909, Nov. 27.	To Interest Coupon on Mortgage.....	$420.00
	To eight days' interest @ 8%.....	.75
		$420.75

$420.00. Indianapolis, Ind., Nov. 19, 1908.

November 19, 1909, I promise to pay to American Central Life Insurance Company Indianapolis, Indiana Four hundred twenty & 00/100 Dollars. Payable at The Indiana National Bank, of Indianapolis, Ind. Value received without any relief whatever from valuation or appraisement laws of the State of Indiana, with interest at the rate of Eight per cent per annum after Maturity until paid and Ten per cent Attorney fees. The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this Note.

DORA E. ROOKER.

Note No. 2 secured by Real Estate Mortgage.
395.
Paid Nov. 29, 1909. Am. Cent. Life, per Hammer.

Approved for payment this 27 day of November 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Nov. 29, 1909.

Received of The Fidelity Trust Company, the sum of Four Hundred & Twenty & 75/100 Dollars in full settlement of the above account.

$420.75.

561 AMERICAN CENTRAL LIFE INSURANCE CO.
R. A. HAMMER.

Paid Nov. 29, 1909. Fidelity Trust Co.
Voucher No. —. $420.75.
Paid Nov. 29, 1909. Fidelity Trust Co.

The Fidelity Trust Company of Indianapolis to American Central Life Ins. Co., *Account Interest Coupon to Mortgage Note on Dora* E. Rooker Real Estate, Dr.

Account Dora E. Rooker Trust.

1910. May 19, to semi annual interest on mortgage on Dora E. Rooker real estate as evidenced by Coupon note, $420.00.

Approved for payment this 3 day of May 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., —— —, 190–.

Received of The Fidelity Trust Company, the sum of Four hundred & Twenty Dollars in full settlement of the above account.
$420.00.

AMERICAN CENTRAL LIFE
INSURANCE CO.
EDWARD A. MEYER,
Comptroller.

Paid May 21, 1910. Fidelity Trust Co.
62 Voucher No. —. $420.00.
Bill of Amer. Cent. Life Ins. Co. on account of Dora E. Rooker.
Paid May 21, 1910. Fidelity Trust Co.
Pay to the order of Capital National Bank. American Central Life Insurance Co., by Geo. E. Hume Treas.
Capital National Bank, Indianapolis, Ind. Paid May 21, 1910.

$420.00. Indianapolis, Ind., Nov. 19, 1908.

May 19, 1910, I promise to pay the American Central Life Insurance Company Indianapolis, Indiana Four hundred twenty & 00 100 Dollars Payable at The Indiana National Bank, of Indianapolis, Ind. Value received withony any relief whatever from valuation or appraisement laws of the State of Indiana, with interest at the rate of Eight per cent, per annum after maturity until paid and Ten per cent Attorney fees. The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this note.

DORA E. ROOKER

Note No. 3 secured by Real Estate Mortgage.
395.

Paid May 19, 1910. American Central Life Ins. Co. Edward A. Meyer."

563 The plaintiffs, by counsel, object to the introduction in evidence of the voucher now offered, Voucher No. 46 in the Bill of Particulars, being to the American Central Life Insurance Company mortgage, to payment made on November 19, 1910, for interest, for the reason that there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is Trustee. That this Exhibit is now offered by the Fidelity Trust Company as Trustee in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them and therefore is not evidence in favor of either of them, and for the further reason that at this time the Fidelity Trust Company was not acting as Trustee but was asserting title hostile and adverse to the trust estate.

(By the Court:) That involves the payment of interest on the mortgage?

(By Mr. Seyfried:) Yes, paid on the order of Mrs. Rooker.

The court then overruled the objection of the Plaintiffs, to which ruling the court granted exceptions.

The plaintiffs, by counsel, then withdrew the objection, and the ruling of the Court was stricken from the record.

564 "The Fidelity Trust Company of Indianapolis to American Central Life Insurance Company Mortgage, Dr.

Account Dora E. Rooker Trust.

1910, Nov. 5.	In full semi-annual installment interest on mortgage on home farm in Hamilton County	$420.00
		$420.00

Approved for payment this 19th day of November 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Nov. 19th, 1910.

Received of The Fidelity Trust Company, Account Dora E. Rooker trust the sum of Four Hundred Twenty and no/100 Dollars in full settlement of the above account.
$420.00.

AMERICAN CENTRAL LIFE INSURANCE CO.,
By GEO. E. HUME,
Treas.

Paid Nov. 15, 1910. Fidelity Trust Co.
Voucher No. —. $420.00.

$420.00. Indianapolis, Ind., Nov. 19, 1908.

November 19, 1910, I promise to pay to American Central Life Insurance Company Indianapolis, Indiana Four hundred twenty & 00/100 Dollars Payable at the Indiana National Bank, of Indianapolis, Ind. Value received without any relief whatever from valuation or appraisement laws of the State of Indiana, with interest at the rate of Eight per cent. per annum after Maturity until paid and Ten per cent Attorney fees. The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this note.

DORA E. ROOKER.

Note No. 4 secured by Real Estate Mortgage 395.

Paid Nov. 15, 1910. American Central Life Ins. Co. Edward A. Meyer, Comptroller.

Return This Notice.

Office

American Central Life Insurance Co.

Home Office: American Central Life Building.

Indianapolis, Oct. 25, 1910.

Fidelity Trust Company,
City:

Please take notice Dora E. Rooker Note, dated Nov. 19 1908 given on account of semi-annual interest on Real Estate Loan No. 395 Will be due Nov. 19, 1910 as follows:

Note $420.00
Interest .....

.....

on or before which date remit to

AMERICAN CENTRAL LIFE INSURANCE CO.
H. M. WOOLEN,
Secretary.

NOTE.—Remit by Money Order, Bank Draft, or Certified Check."

"The Fidelity Trust Company of Indianapolis to American
565 Central Life Insurance Company, Acct. Interest on Mortgage D. E. Rooker, Dr.

Account Dora E. Rooker Trust.

1911, May 1, to semi annual installment interest on mortgage loan on Hamilton County Farm, $420.00.

Approved for payment this 1 day of May 1911.
DORA E. ROOKER

Please sign receipt and present at this office for payment.

Indianapolis, Ind., —— —, 190-.

Received of The Fidelity Trust Company, the sum of Four Hundred and Twenty Dollars in full settlement of the above account.
$420.00. —— ——.

Paid Jun. 6, 1911. American Central Life Ins. Co. E. A. Meyer, Comptroller.
Voucher No. —. $420.00.

$420.00. Indianapolis, Ind., Nov. 19, 1908.

May 19, 1911, I promise to pay to American Central Life Insurance Company Indianapolis, Indiana Four hundred twenty & 00/100 Dollars. Payable at the Indiana National Bank, of Indianapolis, Ind. Value received, without any relief whatever from valuation or appraisement laws of the State of Indiana, with interest at the rate of Eight per cent per annum after Maturity until paid and Ten per cent Attorney fees. The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this note.
DORA E. ROOKER.

567 Note No. 5 secured by Real Estate Mortgage.
395.

Paid June 6, 1911. American Central Life Ins. Co. Edward A. Meyer, Comptroller."

"The Fidelity Trust Company of Indianapolis to American Central Life Ins. Co., Account Semi-annual Interest on Mortgage, Dr.

Account Dora E. Rooker Trust.

1911, Nov. 19, to semi annual interest on mortgage on home farm of American Central Life Ins. Co., $420.00.

Approved for payment this 17 day of November 1911.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Nov. 20, 1911.

Received of The Fidelity Trust Company, the sum of Four hun-
d & twenty Dollars in full settlement of the above account.
—.

AMERICAN CENTRAL LIFE
INSURANCE CO.
By GEO. E. HUME,
Treas.

Voucher No —. $420.00

Pay to the order of Marion Trust Co. American Central Life
Insurance Co., by Geo. E. Hume, Treas.
Pay to the order of Fletcher American Nat'l Bank, In-
dianapolis. 263. Prior Endorsements Guaranteed. 263.
Marion Trust Co. Fred K. Shepard, Secy. & Treas.
Paid Nov. 22, 1911. Fletcher American Nat'l Bank of Indian-
olis. 6. 6."

The Fidelity Trust Company of Indianapolis to American Central
Life Insurance C. on Acct. Interest on Mortgage, Dr.

Acct. Dora E. Rooker Trust.

12. May 19 To semi annual interest on mortgage on
Hamilton County Farm $420.00

$420.00

Approved for payment this 19 day of May 1912.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., May 18, 1912.

Received of The Fidelity Trust Company, the sum of Four hun-
red twenty and 00/100 Dollars in full settlement of the above ac-
ount.
—.

AMERICAN CENTRAL LIFE
INSURANCE CO.
EDWARD A. MEYER,
Comptroller.

Voucher No. —. $420.00.
Paid.

569 $120.00. Indianapolis, Ind., Nov. 19, 1908.

Mah 19, 1912, I promise to pay to American Central Life Insurance Company Indianapolis, Indiana Four hundred twenty & 00/100 Dollars Payable at the Indiana National Bank, of Indianapolis, Ind. Value received without relief whatever from valuation or appraisement laws of the State of Indiana, with interest at the rate of Eight per cent per annum after Maturity until paid and Ten per cent Attorney fees. The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this Note.

DORA E. ROOKER.

Note No. 7 secured by Real Estate Mortgage.
395
Paid Jun. 3, 1912. American Central Life Ins. Co. Edward A. Meyer, Compstroller."

"The Fidelity Trust Company of Indianapolis to Indpls. Life Ins. Co., Interest Coupon, Dr.

Acct. Dora E. Rooker.

1909, Dec. 10, to Interest Coupon on Mortgage, 182.70.
Loan to Sept. 12 09.

Approved for payment this 10 day of December 1909.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Dec. 11, 1909.

Received of The Fidelity Trust Company, the sum of One
570 Hundred Eighty-two and 70 100 Dollars in full settlement of the above account.
$182.70.

INDIANAPOLIS LIFE INS. CO.,
Per M. WALSH.

Paid Dec. 11, 1909. Fidelity Trust Co.
Voucher No. —. $182.70.
Bill of Indianapolis Life Ins. Co. on account of Dora E. Rooker.
Paid Dec. 11, 1909. Fidelity Trust Co.
$180.00

March 12, 1909.

Six months after date we promise to pay to the order of Indianapolis Life Ins Co. One Hundred and Eighty Dollars, and ten per cent attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis, value received, without any relief whatever from val-

ation or appraisement laws, with interest at eight per cent per nnum after maturity.

WILLIAM V. ROOKER.
DORA E. ROOKER.

Loan No. —.
Due —— —, ——."

The Fidelity Trust Company of Indianapolis to Indianapolis Life Insurance Co. on Account Interest Owing from the Dora E. Rooker Trust, Dr.

Account Dora E. Rooker Trust.

571 1910, April 16, to interest due on coupon note secured by mortgage on real estate, $180.00.

Approved for payment this 16 day of April 1910.
DORA E. ROOKER

Please sign receipt and present at this office for payment.

Indianapolis, Ind., May 10, 1910.

Received of The Fidelity Trust Company, the sum of One Hundred Eighty and no 100 Dollars in full settlement of the above account.
$—.
INDIANAPOLIS LIFE INS. CO.
Per M. WALSH,
Ass't Cashier.

Paid May 12, 1910. Fidelity Trust Co
Voucher No. —. $180.00.
Pay to the order of Columbia National Bank. Indianapolis Life Ins. Co., Per M. Walsh.
Columbia National Bank. Paid May 12, 1910. —— ——, Receiving Teller.

$180.00. Indianapolis, Ind., March 12, 1909.

Twelve Months after date we promise to pay to the order of Indianapolis Life Ins. Co. One Hundred and Eighty Dollars, and ten per cent attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis value received, without any relief whatever from valuation or appraisement laws, with interest at eight per cent
572 per annum after maturity.

WILLIAM V. ROOKER.
DORA E. ROOKER.

Loan No. —.
Due —— —, ——.

Paid 5-5-10. Indianapolis Life Ins. Co., by M. Walsh."

Court Adjourned until 9 o'clock Wednesday morning.

Wednesday A. M., July 31, 1918.

WILLIAM M. FOGARTY, witness, recalled for

Direct examination.

Questions by Mr. Henry Seyfried:

Q. Mr. Fogarty, I hand you a voucher marked Defendant's Exhibit No. 3, and you may look at the same?

A. Yes, sir.

Q. And you may state whether you know whose signature is attached thereto?

A. Yes.

573 Q. Whose signature is that?

A. Dora E. Rooker.

Q. And you may state whether or not that voucher was presented by the party in whose favor it was drawn?

A. It was.

Q. And you may state whether or not the Fidelity Trust Company paid that voucher?

The plaintiffs, by counsel, object, your Honor, for the reason the voucher should first be introduced, or at least shown to us.

The defendant, by counsel, now offers to introduce in evidence voucher marked by the reporter for identification as Defendant's Exhibit No. 3, in favor of George Keyser, signed by Dora E. Rooker in the sum of four hundred dollars, together with the bill attached.

(By Mr. W. V. Rooker:) Now, on this matter, your Honor, I wish the record to show that we renew our request, and as to this item we ask the Court to prepare a record showing a reserved question of law. Our objection to this memoranda now offered, is first, that it is offered both by the Fidelity Trust Company in its corporate capacity proper, pleaded as such in this case, and also by the Fidelity Trust Company as Trustee. We further object for the reason that this voucher, as shown by the evidence in this case, was

574 a part payment on a contract for the house described in the trust contract, and that it was for plumbing, as shown by the pleadings, and that on the payment of this sum the contract with Mr. Keyser was ordered suspended, and was suspended by the Fidelity Trust Company, so that no part of the work that this claim pays for ever has been useful to the house; and that by the suspension of it the trust estate was greatly damaged in that the favorable contract which the trust estate had with Mr. Keyser as to price and terms of payment, etc. having been suspended, the damages resulting from that suspension would largely exceed the value of this payment.

(By the Court:) There is no dispute but that this money was paid to the plaintiff?

(By Mr. Rooker:) I think that is true.

The Court then overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

(By Mr. Seyfried:) On behalf of the defendant the Fidelity Trust Company, I would like for the record to show that this
575 payment, and all other payments made by it, were made by the Fidelity Trust Company pursuant to and under the agreement of trust and upon the security of the deeds of conveyance herein introduced; and that the only relation that the Fidelity Trust Company proper has thereto, is that the Fidelity Trust Company as Trustee had no funds belonging to the trust estate and that the funds with which the payment of this voucher, and all other vouchers, were made were furnished by the Fidelity Trust Company. I state this in order that our position in this case may not be confused by the distinction which the plaintiffs seek to make.

(By Mr. Rooker:) Now, on the statement of counsel just now made, and which has gone into the record, your Honor, the plaintiffs in this case move the Court to strike from the complaint and from all other pleadings filed, strike from the counter-claim and answer, the name of the Fidelity Trust Company in its corporate capacity proper, and we ask that that motion be extended to include all pleadings in which the Fidelity Trust Company as Trustee and the Fidelity Trust Company in its corporate capacity
576 proper appear to be jointly litigating these particular rights.

The court refused the motion to strike out, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

Q. You may state, Mr. Fogarty, whether this voucher was paid in the sum for which it was drawn?

A. It was.

Q. Meaning Exhibit No. 3, voucher in favor of George W. Keyser for four hundred dollars.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 3, which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT No. 3.

The Fidelity Trust Company of Indianapolis to George W. Keyser on Acct. Plumbing on the Dora E. Rooker House. Dr.

Acct. Dora E. Rooker Trust.

1910, Feby. 24.	To George W. Keyser on account plumbing Dora E. Rooker residence.....	$400.00
		$400.00

Approved for payment this 24 day of February 1910.
DORA E. ROOKER.

577 Please sign receipt and present at this office for payment.

Indianapolis, Ind., Apr. 9, 1910.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker trust the sum of Four Hundred Dollars in full settlement of the above account.
$400.00.

GEO. W. KEYSER

Paid Apr. 9, 1910. Fidelity Trust Co.
Voucher No. —. $400.00.
Bill of —— —— on account of Dora E. Rooker.
Paid Apr. 9, 1910. Fidelity Trust Co.

Indianapolis, Ind., —— —, 19

Mrs. W. V. Rooker to George W. Keyser, Dr.

Plumbing, Steam, and Hot Water Heating Contractor,

946–948 Fort Wayne Avenue.

Residence Near Noblesville, Ind

2 36 x 6 Pressure Tanks 1 Hand pump 2 Valves 2 Pressure gauges	100.50
Hot water boiler:	
1 sixty gallon galv. iron Boiler, stand & coupling & pipe connections	24.40
Water heater:	
1 Ideal Jr. Water Heater	14.75
Smoke pipe	1.25
578	
Pipe connection	2.50
Bath tubs:	
2 5½ ft. 3″ under roll rim enameled iron Bath Tubs N. P. combination supply N. P. Ideal waste extra finish enameled exterior	92.70

Lavatories:

3 Standard open Lavatories, Ideal basin all as shown L. Wolff catalog, 52.80 ..... 118.40

Water closets:

3 Parvus Water Closets with low down #16 oak lead lined Tank all as shown L. Wolff catalog, F. 1172.. 117.80

Kitchen sink:

1 Duro Stone Kitchen Sink 24 x 40 x 8" deep with two drain boards each 18" long total length of sink and drain boards 6'4" with 16" high backs & left end grooved drain board with apron, polished brass rim N. P. legs and frame- two N. P. Fuller flange bibb all as shown as described L. Wolff catalog F 5192.. 54.83

Soil pipe:

160 ft.	4" c. i. Soil pipe	30.82
9	4" " " " " Y branch	5.83
5	4" " " " " ¼ Bends	3.90
40 ft	2" c. i. Soil pipe	6.62
4	2" " " " " Y branch	3.50
3	2" " " " " ¼ Bends	3.24
130#	lead packing	9.95
20#	Hemp packing	3.99

579

2	4" flashing	5.50
25 ft.	1½ light lead pipe	9.40
2	4" Drum Traps	3.90
3	4" lead bends	2.40
3	4" " ferrules	3.40
18#	solder	3.40
4	4" cleanouts	3.75

Local ventilating pipe

56 ft.	1½ ventilating pipe	5.36
56 ft.	2" of " "	7.20
5	2" tees	3.50
6	1½ Tees	2.87
4	1½ ells	2.54
56 ft.	1¼" galv. iron pipe	6.14
4	1¼" elbows	2.44
1	1¼ pump strainer	2.15

Supply pipes:

310 ft. ¾" galv. iron pipe	13.74
20 ¾ fittings	3.45
90 ft. ½ return pipe	5.01
6 1 3 galv. iron fittings	2.35
4 ¾ stop cocks	1.52
32 ¾" pipe stools	3.10
24 days labor P. & H.	114.00
R. R. Fare, freight & drayage	40.00
362 ft. 1¼" galv. iron pipe	25.00
277 " ¾ galv. iron pipe	10.49
Fittings	1.10

Laundry tub:

1 3 part Laundry Tub complete with all fixtures	77.00
	988.00
580	

Extra piping to pool:

30 ft. 3" Soil pipe	6.10
4 ft. 3" wrought pipe	1.92
2 3 x 10 nipples	.67
1 3" ell	.65
1 3" bend	.50
1 3" Gate Valve	6.50
30# lead	2.70
Freight & boxing	.50
Labor P. & H.	18.00
	1,025.34
By Cash	200.00
	825.34

March 31. 1910.

The amount, eight hundred and twenty five and 34 100 ($825.34) dollars is OK with the proviso that the materials not yet installed as shown on the following page hereto attached is completed and installed as required by Mr. Keyser's contract.

DORA E. BOOKER.
By W. V. BOOKER.
Her Agent.

Work and Material Not Installed.

2 36" x 6' Pressure Tanks 1 Hand Pump 1 1 Valve 2 Pressure gauges	100.50

Hot-water heater:

1 Ideal Water Heater	14.75

581

Smoke Pipe	1.25
Pipe connection	2.10

Bath tub:

1 5½ ft. 3" under roll rim enameled Bath N. P. combination supply N. P. Ideal waste all as shown	46.35

Pipe & fittings:

363 ft. 1¼" galv. iron pipe	20.00
277 ft. ¾" galv. iron pipe	10.00
Fittings	5.10
Labor etc.	28.00
R. R. fare & freight	10.00
	238.05

George W. Keyser, Dr., against Mrs. W. V. Rooker.

Q. I hand you, Mr. Fogarty, a voucher marked Defendant's Exhibit No. 4, and you may state whether you know who executed that voucher?

A. Yes.

Q. Who was it?

A. Dora E. Rooker.

Q. It bears her signature?

A. Yes.

Q. And in whose favor?

A. Lacy Seed and Hay Company.

Q. And that voucher was presented to your Company?

A. Yes.

582 The defendant, by counsel, now offers to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit 4.

The plaintiffs, by counsel, renew the request for a reserved question of law, and we make the objection to this that, upon the pleadings in this case, it will be shown that this voucher was for seed and clover sown and subsequently lost to the trust estate because of the refusal of the Trust Company to provide the means with which the crops growing out of these seeds could be harvested.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 4 voucher in favor of the Lacy Seed and Hay Company, which is in the words and figures following, namely:

DEFENDANT'S EXHIBIT No. 1.

"The Fidelity Trust Company of Indianapolis to Lacy Seed & Hay Company Ten Days' Sight for Maintenance Farms Dora E. Rooker Acct., Dr.

583 Acct. Dora E. Rooker Trust.

1910. April 11. To 150 bu. seed oats @ 55¢ per bu..... $82.50
To 12 bu. clover seed @ 8.50 per bu.... 102.00

184.50

This seed to be used on the farm of Dora E. Rooker in Hamilton County, Ind.
O. K.
W. M. F.

Approved for payment this 11 day of April 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Noblesville, Ind. April 11, 1910

Received of The Fidelity Trust Company, the sum of One Hundred Eighty-four & 50/100 Dollars in full settlement of the above account.
$184.50.
LACY SEED & HAY CO.

Paid Apr. 12, 1910. Fidelity Trust Co.
Voucher No. —. $184.50.
Bill of —— —— on account of Rooker.
Pay any Bank or Banker, or order. (All previous Endorsements Guaranteed.) Citizens State Bank, Noblesville, Indiana. E. S. Baker, Cashier.
Paid Apr. 12, 1910. Indiana Nat'l Bank."

584 Q. Now you may state, Mr. Fogarty, whether this voucher in favor of the Lacy Company, upon presentation to the Company, was paid?
A. It was.

Preliminary Questions Asked by Mr. Rooker.

Q. Mr. Fogarty, I call your attention in this memorandum to the notation "this seed to be used on the farm of Dora E. Rooker in Hamilton County, Indiana," do you know who made that notation?
A. No, I don't; it was on the voucher, I assume, when it was originally presented.

By Mr. Rooker:

Q. Do you know whether it was made by Mr. Lacy?
A. I don't know.

By Mr. Rooker:

Q. But you know it is neither mine nor my wife's writing, don't you?
A. Well, I would not say as to that.

By Mr. Rooker:

Q. This signature was made by Lacy?
A. Yes, their Company

By Mr. Rooker:

Q. At the time you made this payment, did you impose any condition as to memoranda, on the payee?
A. Yes, sir.

The plaintiffs, by counsel, now add to their objection that this instrument appears to have been modified after Dora E. Rooker executed it.

(By the Court:) Was the amount modified?
A. No, I don't know.

585 By the Court:

Q. Did you get the money for this seed?
A. I imagine Lacy got it.

The court then overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

Q. This voucher was paid by you in the form in which it came to you?
A. Yes, sir.
Q. And whatever has been spoken of as a modification thereon was not made by you or by any person connected with the Fidelity Trust Company?
A. No, sir, it was not.
Q. I hand you Exhibit No. 5, Mr. Fogarty; you may state whether you know whose signature it bears, as the maker?
A. Yes.
Q. Whose signature is it?
A. Dora E. Rooker.
Q. To whom payable?
A. Illinois Surety Company.
Q. In what sum?
A. Five hundred and five dollars.

Q. Was that voucher presented to your office?
A. Yes.

The defendant, by counsel, now offers to introduce in evidence and read in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 5, voucher
586 issued by Dora E. Rooker in favor of the Illinois Surety Company.

The plaintiffs, by counsel, object, Your Honor, to the introduction, and as to this we want a reserved question of law, and we make the objection to this instrument that it is alien to the administration of this trust; that it is a debt, if a debt at all, that is outside of this contract, and was a debt made with the Fidelity Trust Company and not with the Fidelity Trust Company as Trustee; that was an engagement for contract of suretyship on an appeal bond, and that it appears from the records in this case to be a duplication of another charge; as the record shows there, we got this item in this record twice.

(By the Court:) Is that true?

(By Mr. Seyfried:) It is not true. The facts are, that is on mechanic's lien. Mrs. Rooker was appealing and gave that bond; the Surety Company required a deposit as guaranty on the bond. Afterwards, after the cause was decided by the Appellate Court in favor of Mrs. Rooker, we did get back from the Surety Company the amount of that money which had been turned over to them in the form of a certificate, and when we got it back we cred-
587 ited it which will be in evidence.

(By Mr. Rooker:) I am willing to let the record show that these people paid the judgment which was represented by the mechanic's lien that was involved in that proceeding, and they can show the payment of that judgment, but I do say it is unfair and not within the issues in this case to show the indemnity and to get a surety to go on an appeal bond, and show both the indemnity appeal bond and the record show the payment of judgment in trust estate.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 5, which Exhibit is in the words and figures following to-wit:

DEFENDANT'S EXHIBIT No. 5.

"The Fidelity Trust Company of Indianapolis to Illinois Surety Company, Dr.

588 Account Dora E. Rooker Trust.

1910, Aug. 26.	To premium on Supersedeas bond in cause No. 7783 in the Appellate Court of Indiana Wherein William V. Rooker and Dora E. Rooker are appellants and Ludowici & Celadon Co. is appellee....	$5.00
	To indemnity deposit to indemnify said Surety Company as surety on said supersedeas bond in the event the judgment from which said appeal is prosecuted shall be finally affirmed.....	500.00
		$505.00

Approved for payment this 26 day of August 1910.
DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Aug. 26, 1910.

Received of The Fidelity Trust Company, the sum of Five Hundred and Five & no 100 Dollars as collateral security for indemnity bond.

$505.00 ILLINOIS SURETY CO.,
By HUBERT HERDSWALL,
Atty. in Fact.

Voucher No. —. $505.00."

Q. This voucher, upon presentation to your office, was paid by the defendant in this case, was it?

A. Yes.

Q. Now, Mr. Fogarty, you may state whether or not you later on obtained from the Illinois Surety Company the return of the
589 five hundred dollars, principal amount of this voucher introduced and read in evidence and identified as Exhibit No. 5, and if so, state what amount of money you recovered back from the Surety Company on that guaranty deposit and the date of it?

A. Our records show a credit by certificate of deposit and interest of five hundred sixty-six dollars and sixty-four cents.

Q. And was that—what day was that?

A. January 8, 1914.

Q. And was that amount credited to the trust account against Mrs. Rooker?

A. Yes, sir, it was.
Q. On what date?
A. January 8, 1914.
Q. Now, going back to this voucher identified as Exhibit No. 5 in favor of the Illinois Surety Company, I will ask you to state whether or not the five dollars of the voucher was for a premium on appeal bond?
A. Yes, sir, it was.
Q. I will ask you whether or not the five hundred dollars was as an indemnity to the Illinois Surety Company as surety on a supersedeas bond, in event the judgment appealed by Mrs. Rooker shall be prosecuted to final appeal?

The plaintiffs, by counsel, object to that, your Honor, for the reason it shows the existence of a contract which has not been pleaded in this case, and it requires a duplication of the record as
590 an ultimate——

The defendant, by counsel, withdrew the question.

Q. Well, the five hundred dollars you got back from the Illinois Surety Company, plus the interest on it, was the five hundred dollars put up as indemnity under this voucher of five hundred and five dollars to the Illinois Surety Company?
A. Yes, sir, it was.
Q. I will hand you defendant's Exhibit No. 6, and you may state whether you know who executed that voucher?
A. Yes, sir.
Q. Who was it?
A. Dora E. Rooker.
Q. And in whose favor is it drawn?
A. Fidelity Trust Company.
Q. And the amount?
A. Three hundred ninety-three dollars and twenty cents.
Q. And was that voucher left with the Trust Company by Mrs. Rooker?
A. Yes, sir.

The defendant, by counsel, now offers to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 6.

The plaintiffs, by counsel, object to this, your Honor, and we ask the Court for a reserved question of law on this Exhibit, for the reason, among other things, that this shows an aggregate
591 of items, including those fees which should have gone to the Trustee on the performance of the trust agreement, and that until they have shown the performance of the trust agreement, they are not entitled to the collection of the charges which they were to have, conditioned upon the performance of the trust agreement; and for the further reason it will be shown in evidence that a part of this item affecting insurance never was taken out.

(By Mr. Seyfried:) As to the last remark, we will introduce evidence showing a credit for the insurance policy as cancelled.

The court overruled the objection of the plaintiffs, to which ruling of the court, the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 6, which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT No. 6.

"The Fidelity Trust Company of Indianapolis, Trustee for
592 Dora E. Rooker, to Fidelity Trust Co., Dr.

1909.			
Oct. 11.	To Trustee Fee		150
	" Commission on $6,000 @ 2%		120
	" Attorney Fee		25
	" Insurance $6,000 @ 1½ & 2%		95
	" Recording Deed, Hamilton County		1.70
	" " " Marion County		1.50
			393.20

Approved for payment this day of 16 October 1909.

DORA E. ROOKER.

Please sign receipt and present at this office for payment.

Indianapolis, Ind., Oct. 16, 1909.

Received of The Fidelity Trust Company, the sum of Three hundred, ninety-three & 20/100 Dollars in full settlement of the above account.

$393.20.

FIDELITY TRUST COMPANY,
By THOMAS B. FULMER,
Secretary-Treasurer.

Voucher No. . $393.20.

Paid Oct. 16, 1909. Fidelity Trust Company.

Indianapolis, Ind., Oct. 11, 1909.

Received of Fidelity Trust Company, the sum of One and 50/100 Dollars, for Recording W. Deed from Wm. V. Rooker & wife to Fidelity Trust Co. Trustee.

$1.50.

HARRY R. WALLACE."

Q. This voucher was paid, was it, Mr. Fogarty?

A. Yes.

593 Q. Now, Mr. Fogarty, you may refer to your ledger account, and state whether or not there was any credit after-

wards given to the account of Dora E. Rooker with regard to insurance of six thousand dollars, premium of which amounts to ninety-five dollars, which is included in the voucher identified as Exhibit No. 6?

A. Yes, sir.

Q. And how much credit was given to the account?

A. Ninety-five dollars.

Q. On what date?

A. October 26, 1909.

Q. And you admit that credit in favor of Mrs. Rooker?

A. Yes.

By Mr. Rooker:

Q. As against this particular voucher?

A. Yes.

Q. I hand you a check marked Defendant's Exhibit No. 7, drawn by myself as attorney for the Trust Company; you may state whether or not the Trust Company paid that check?

A. It did.

Q. In the amount for which it is drawn?

A. Yes, sir.

Q. And you may state whether or not—or you may state what that check was paid for, that is, what it paid off?

The plaintiffs, by counsel, object, your Honor, for the reason the check represents a confused item, a part of which might be a liability against the estate, but the aggregate of which is not a liability,
594 and that it is not the duty of the Court, that it is the duty of the Trustee rather than the trust, to separate the over-charge items from the true items, and that the item as offered is not a liability of the trust estate.

The court overruled the objections of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Q. State what the check paid?

A. Balke and Krauss judgment.

Q. And for the purpose of qualifying that, were you ever here at the time the mechanic's lien suit was tried, of the Balke & Krauss Company against Mrs. Rooker?

A. Was we represented by Mr. Shoals?

Q. Yes.

A. Yes.

Q. Did you see Rooker defending the suit?

A. I was not here when the check was filed.

Q. You were when the case was tried?

A. Yes.

Q. And did you see Mr. Rooker here present defending the suit?

A. Yes.

Q. I will ask you whether or not that is not the suit the defendant

stood on the ground the Balke & Krauss Company did not have a lien?

The plaintiffs, by counsel, object to that question.

595 (By the Court:) This is all the suit I want to take care of.

The Court then sustained the objection of the plaintiffs, to which ruling of the court the defendants, by counsel, then and there took an exception.

Q. Now, the Fidelity Trust Company paid this check of five hundred seventy-one dollars and twenty-one cents?
A. Yes, sir.

The defendants, by counsel, offer to introduce in evidence and read in evidence the check of the Balke-Krauss Company, which has been marked by the reporter for identification as Defendant's Exhibit No. 7.

The plaintiffs, by counsel, ask your Honor for a reserved question of law, and we object to the introduction of the Exhibit now offered for the reason there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is Trustee; that this Exhibit is now offered by the Fidelity Trust Company as Trustee in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them, and therefore is not evidence in favor of either of them.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an
596 exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 7, which exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT NO. 7.

"Fidelity Trust Company.

Rooker Trust.

No. —.

Indianapolis, Ind., March 17, 1913.

Pay to the Order of Balke Krauss Co. $571.21. Five Hundred Seventy-one 21/100 Dollars.

HENRY SEYFRIED,
Attorney.

Fidelity Trust Company, Indianapolis.

To Rooker Trust a/c assignment of Judgment. Paid.
Balke & Krauss Co., by H. H. Schulz, Treas. A. Paid Mar. 19, 1913. K. Merchants Nat'l Bank, Indianapolis, Ind."

Q. I will ask you this further question, whether or not this check was paid in payment of the judgment on mechanic's lien taken against Mrs. Rooker's property in Hamilton County?

The plaintiffs, by counsel, object to that question for the
597 reason that this instrument on its face shows a purchase of a judgment and assignment to the Fidelity Trust Company, and not a payment by the Fidelity Trust Company as Trustee; that this assignment was the acquisition of an hostile and adverse interest, by this defendant, to this estate; while they might have paid these judgments, they could not procure an assignment and hold it.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

Q. State whether or not you paid this in order to save the property from being sold under that foreclosure, Mr. Fogarty?

A. Yes.

The plaintiffs, by counsel, object as calling for a conclusion.

(By the Court:) No, that may remain in the record; you raised the question as to the reason this check was given; now they have a right, under that statement, to ask why the check was given.

Q. I hand you Defendant's Exhibit No. 8, Mr. Fogarty, and you may state whether or not your Company paid the check that you hold in your hand?

A. Yes.

Q. In whose favor was it drawn?

A. Indianapolis Life Insurance Company.

598 Q. By whom?

A. By the Fidelity Trust Company by its proper officers.

Q. For what purpose was it drawn?

A. Payment of interest on mortgage loan.

Q. Whose mortgage loan?

A. The mortgage loan made by William V. Rooker and Dora E. Rooker on the Marion County lands in this trust.

Q. And that mortgage was on this property at the time this trust deed was executed?

A. Yes, it was.

The defendant, by counsel, now offers to introduce in evidence and read in evidence the check which has been marked by the reporter for identification as Defendant's Exhibit No. 8.

The plaintiffs, by counsel, ask your Honor for a reserved question of law, and we object to the introduction of the Exhibit now offered for the reason there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is Trustee; that this Exhibit is now offered by the Fidelity Trust Company as Trustee in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them, and therefore is not evidence in favor of either of them.

The court overruled the objection of the plaintiffs, to which
599 ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 8 which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 8.

"Fidelity Trust Company.

$180 X. Indianapolis, Ind., Oct. 11, 1910. No. 2219.

Pay to the Order of Indianapolis Life Insurance Co., $180.00 One Hundred Eighty and no/100 Dollars.

Fidelity Trust Company, Indianapolis.

W. M. FOGARTY,
President.
THOMAS B. FULMER,
Secy. & Treas.

To the Capital National Bank, Indianapolis, Ind.

Paid.

Pay to the order of Union National Bank, Indianapolis, Ind. Indianapolis Life Ins. Co., by M. Walsh.

Union National Bank, Indianapolis, Ind. Paid Oct. 17, 1910. B. T.

'Credit. Date —— —, 191-.'

600 "$180.00.

March 12, 1909.

Eighteen Mo. after date We promise to pay to the order of Indianapolis Life Ins. Co. One Hundred and Eighty Dollars, and ten per cent attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis, value received, without any relief whatever from valuation or appraisement laws, with interest at eight per cent per annum after maturity.

WILLIAM V. ROOKER
DORA E. ROOKER

Loan No. —.

Due —— —, ——.

Paid Oct. 13, 1910. Indianapolis Life Ins. Co. A. L. Portteus."

Q. I hand you Exhibit No. 9, Mr. Fogarty, and you may tell the court whether the voucher which is identified by that number was paid by your Company?

A. Yes, sir.

Q. And for what purpose?

The plaintiffs, by counsel, object to the cross examination until we first find out whether it is admissible in evidence.

Q. And for what purpose was it paid?
A. Mortgage loan interest to the Indianapolis Life Insurance Company.

The plaintiffs, by counsel, object to the cross examination
601 on the voucher before the admissibility of the voucher is shown.

(By the Court:) The way to do this, Mr. Seyfried, is to identify the voucher first.

The court overruled the objection of the plaintiffs, to which ruling of the court, the plaintiffs, by counsel, then and there took an exception.

By Mr. Rooker:

Q. What is the date of this?
A. July 12, 1912.
Q. Who issued this voucher, Mr. Fogarty?

(By Mr. Rooker:) The plaintiffs will admit that.

The defendant, by counsel, then offered to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 9, which was admitted by the plaintiffs. The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 9, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 9.

"The Fidelity Trust Company of Indianapolis to Indianapolis Life Ins. Co., Dr.

a c Dora E. Rooker.

602 Interest on mortgage as Per bill attached. 565.00

Approved for payment this 11 day of July 1912.
FIDELITY TRUST CO.
J. ALBERT SMITH,
Trust Officer.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., July 12th, 1912.

Received of The Fidelity Trust Company, the sum of Five Hundred Sixty Five no/100 Dollars in full settlement of the above account.
$565.00. INDIANAPOLIS LIFE INS. CO.
By A. L. PORTTEUS,
Cashier.

Voucher No. —. $565.00.
Bill of Indianapolis Life Ins. Co. on account of Dora E. Rooker.
Paid 7-12-12.
Pay to the order of National City Bank, of Indianapolis. Indianapolis Life Ins. Co., Per M. Walsh, Ass't Cashier.
National City Bank, Indianapolis, Ind. Paid Jul. 13, 1912. —— ——, Receiving Teller.

'*Notice of Delinquency.*

603 Indianapolis Life Insurance Company, Indianapolis, Ind.

Fidelity Trust Company, trustee, city:

DEAR SIRS:

Your interest coupon for	$540.00
and accumulated interest thereon of	25.00
Total	$565.00

were due March 12th, 1912, on Mortgage Loan No. 25. On or before above date, payment must be made to the Home Office of the Company at Indianapolis, Indiana. Trusting you will give this matter your prompt attention, we are

Yours very truly,
INDIANAPOLIS LIFE INSURANCE CO.
Per A. L. P.,
Cashier.

July 2nd, 1912.

(Return this Notice with Remittance.)'

'$180.00. March 12, 1909.

Thirty-six Mo. after date we promise to pay to the order of Indianapolis Life Ins. Co. One Hundred and Eighty Dollars, and ten per cent. attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis, value received, without any relief whatever from valuation or appraisement laws with interest at eight per cent. per annum after maturity.

WILLIAM V. ROOKER.
DORA E. ROOKER.

Loan No. 25.
Due —— —, ——.

Indianapolis Life Insurance Co., Indianapolis, Ind. Paid Jul. 12, 1912.'

'$180.00. March 12, 1909.

Thirty Months after date we promise to pay to the order of
604 Indianapolis Life Ins. Co. One Hundred and Eighty Dollars, and ten per cent. attorney's fees, negotiable and payable at

American Nat. Bank, Indianapolis value received, without any relief whatever from valuation or appraisement laws, with interest at eight per cent. per annum after maturity.

WILLIAM V. ROOKER.
DORA E. ROOKER.

Loan No. 25.
Due —— —, ——.

Indianapolis Life Insurance Co., Indianapolis, Ind. Paid Jul. 12, 1912.'

'$180.00. March 12, 1909.

Twenty-four Mo. after date we promise to pay to the order of Indianapolis Life Ins. Co. One Hundred and Eighty Dollars, and ten per cent. attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis value received, without any relief whatever from valuation or appraisement laws, with interest at eight per cent per annum after maturity.

WILLIAM V. ROOKER.
DORA E. ROOKER.

Loan No. 25.
Due 3-12-11.

Indianapolis Life Insurance Co., Indianapolis, Ind. Paid Jul. 12 1912."

Q. Here is fifty-six for accumulation of interest on the same loan?

The plaintiffs, by counsel, as to this ask a reserved question
605 of law, and we make the objection for the reason there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is Trustee that this exhibit was introduced by the Fidelity Trust Company as Trustee in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them, and therefore is not evidence in favor of either of them; and we make the further objection that at the time this payment was made the Fidelity Trust Company had, in this court, in this cause, by these pleadings, taken the position that it was not a trustee but was a mortgagee, and was asserting title adverse to the trust estate and wrongful, and that this payment, if made, was made by the Fidelity Trust Company in aid of its own wrong, and that it can not in a court of equity acquire credit for any payment made in aid of its own wrong.

(By the Court:) It might be this Company was in aid of paying the mortgage off, they would be in danger of foreclosure of mortgage.

The court then overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

606 Q. I hand you voucher marked Defendant's Exhibit No. 10, you may tell the Court who drew that voucher?

A. The Fidelity Trust Company by its proper officers.

Q. For what purpose did the Company draw it?

A. To pay the Indianapolis Life Insurance Company, interest on the Rooker mortgage.

Q. And that mortgage existed on the Marion County lands, did it?

A. Yes.

Q. And was it drawn in favor of the mortgagee in that Life Insurance Company?

A. Yes.

Q. And was that interest due?

A. Yes.

Q. And after delivery of this voucher to the Indianapolis Life Insurance Company, was it presented at your Trust Company for payment?

A. Yes.

Q. And was it paid by the Trust Company?

A. It was.

The defendant, by counsel, now offers to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 10, voucher drawn against the account of Dora E. Rooker in favor of the Indianapolis Life Insurance Company.

The plaintiffs, by counsel, ask for a reserved question of law, and we object to the introduction of the Exhibit now offered for
607 the reason there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is Trustee; that this exhibit is now offered by the Fidelity Trust Company as Trustee in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them, and therefore is not evidence in favor of either of them.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 10, which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT No. 10.

"The Fidelity Trust Company of Indianapolis to Indpls. Life Ins. Co., Dr.

Dora E. Rooker.

Int. note due 9/12/12	180.00
Int. accrued to Nov. 5, 1913	16.56
Int. note due 3/12/13	180.00
" accrued to Nov. 5, 1913	9.36
608	
Int. note due 9/12/13	180.00
" accrued to Nov. 5, 1913	2.16
Accrued int. on principal note from 9/12/13 to 11/5/13	54.00
	622.08

Approved for payment this 3rd day of November 1913.
FIDELITY TRUST COMPANY,
By W. M. FOGARTY,
Pres.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Nov. 3, 1913.

Received of The Fidelity Trust Company, for & on account of Dora E. Rooker the sum of Six Hundred and twenty-two and 08/100 Dollars in full settlement of the above account.
$622.08.

INDPLE. LIFE INS. CO.
A. LEROY PORTTEUS,
Cashier.

Paid 11-4-13.
Voucher No. —. $622.08.
Bill of Ind. Life Ins. Co. on account of Dora E. Rooker.

Indianapolis, Ind., Nov. 3rd, 1913.

Received of Fidelity Trust Co. Six Hundred Twenty-Two 08/100 Dollars For Interest on the Dora E. and W. V. Rooker Mtg. Loan.
$622.08.

INDIANAPOLIS LIFE INS. CO.,
By A. LEROY PORTTEUS,
Cashier.

609 "$180.00. March 12, 1909.

Fifty-two Months after date we promise to pay to the order of Indianapolis Life Ins. Co. One Hundred and Eighty Dollars, and ten per cent attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis, value received, without any relief whatever from valuation or appraisement laws, with interest at eight per cent per annum after maturity.

WILLIAM V. ROOKER.
DORA E. ROOKER.

Loan No. 25.
Due 9-12-13."

Indianapolis Life Insurance Co., Indianapolis, Ind. Paid Nov. 5, 1913."

$180.00.

March 12, 1909.

Forty-eight Mo. after date we promise to pay to the order of Indianapolis Life Ins. Co. One Hundred and Eighty Dollars, and ten per cent, attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis value received, without any relief whatever from valuation or appraisement laws, with interest at eight per cent per annum after maturity.

WILLIAM V. ROOKER
DORA E. ROOKER.

Loan No. 25
Due 3-12-13.

Indianapolis Life Insurance Co., Indianapolis, Ind. Paid Nov. 5, 1913."

"$180.00.

March 12, 1909.

610 Forty-two Mo. after date we promise to pay to the order of Indianapolis Life Ins. Co. One Hundred and Eighty Dollars, and ten per cent attorney's fees, negotiable and payable at American Nat. Bank, Indianapolis, value received, without any relief whatever from valuation or appraisement laws, with interest at eight per cent per annum after maturity.

WILLIAM V. ROOKER.
DORA E. ROOKER.

Loan No. 25.
Due 9-12-12.

Indianapolis Life Insurance Co., Indianapolis, Ind. Paid Nov. 5, 1913."

Q. I hand you voucher identified as Exhibit No. 11, Mr. Fogarty, you make look at the same and tell us who drew that voucher?
A. The Fidelity Trust Company, by its proper officers.
Q. In whose favor?
A. American Central Life Company.

Q. For what purpose?

A. Payment of interest on mortgage made by William V. Rooker and Dora E. Rooker.

Q. On what land?

A. The Hamilton County land.

Q. That is the mortgage on the property?

A. Yes, sir.

Q. And after this voucher was drawn in favor of the Life Insurance Company, was it presented at your office?

A. Yes.

Q. And was it paid?

611 A. Yes.

The defendant, by counsel, now offers to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 11.

The plaintiffs, by counsel, ask the Court for a reserved question of law, and we make the objection that, at the time this payment was made, the Trustee had recently repudiated the trust, and was foreclosing a mortgage against this property, and that this payment was made, if made at all, in aid of the Trust Company's right as a mortgagee, and not in performance of its duty as Trustee; that this claim as mortgagee was an unlawful claim, and that this payment was made by the Trust Company, if made at all, in aid of its own wrong.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 11, which exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT NO. 11.

612 "The Fidelity Trust Company of Indianapolis to American Central Life Ins. Co., City. Dr.

Dora E. Rooker Trustee.

Semi Annual interest due 5-19-1913 $120.00 and 8% from May 19, 6.72, 126.72.

Approved for payment this 31 day of July 1913.

FIDELITY TRUST CO.
TIMOTHY SEXTON,
Asst. Secy. & Treas.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Jul. 31, 1913.

Received of The Fidelity Trust Company, the sum of Four hundred twenty six and 72/100 Dollars in full settlement of the above account.

AMERICAN CENTRAL LIFE INSURANCE CO.
EDWARD A. MEYER,
Comptroller.

$426.72.
Voucher No. —. $426.72.

Bill of American Central Life Ins. Co. on account of Dora E. Rooker.
Paid 7-31-13. 6.72.

$420.00. Indianapolis, Ind., Nov. 19, 1908.

May 19, 1913, I promise to pay to American Central Life Insurance Company Indianapolis, Indiana Four hundred twenty & 00/100 Dollars Payable at the Indiana National Bank, of In-
613 dianapolis, Ind. Value received without any relief whatever from valuation or appraisement laws of the State of Indiana, with interest at the rate of Eight per cent. per annum after Maturity until paid and Ten per cent. Attorney fees. The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and notice of non payment of this Note.

DORA E. ROOKER.

Note No. 9 secured by Real Estate Mortgage 395.
Paid.

Received of Fidelity Trust Co. $426.72 July 31, 1913.

AMERICAN CENTRAL LIFE INS. CO.,
By C. B. WELLMER,
Attorney.

Q. Mr. Fogarty, I hand you Exhibits 12 and 13 together with check attached to them, you may state who drew the check?
A. Fidelity Trust Company by its proper officers.
Q. In whose favor was it drawn?
A. Frank S. Fishback, Treasurer of Marion County.
Q. And for what amount is the check drawn?
A. Two hundred seventy-nine dollars and five cents.
Q. And for what amounts, what amounts do the vouchers represent?
A. Ninety-nine dollars and thirty-seven cents.
Q. Yes, what is the other?
A. And fifty-nine dollars and fourteen cents. Now, this check, however, the amount includes payment of other items of taxes

than the Rooker; the amount pertaining to the Rooker is
614 ninety-nine dollars and thirty-seven cents and fifty-nine dollars and fourteen cents.

Q. Now you may state whether these vouchers identified as Exhibits 12 and 13 were obtained from you, from the Treasurer of Marion County, Frank Fishback?

A. Yes.

Q. And you may state whether or not you paid the amounts of ninety-nine dollars and thirty-seven cents and fifty-nine dollars and fourteen cents respectively?

A. Yes.

The defendant, by counsel, now offers to introduce in evidence the vouchers which have been marked by the reporter for identification as Defendant's Exhibit No. 12 and Defendant's Exhibit No. 13.

The plaintiffs, by counsel, ask the court for a reserved question of law, and we make the objection that, at the time this payment was made, the Trustee had recently repudiated the trust, and was foreclosing a mortgage against this property, and that this payment was made, if made at all, in aid of the Trust Company's right as a mortgagee, and not in performance of its duty as Trustee; that this claim as mortgagee was an unlawful claim, and that this payment was made by the Trust Company, if made at all, in aid of its own wrong.

The court overruled the objection of the plaintiffs, to
615 which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court defendant's exhibits 12 and 13, which exhibits are in the words and figures following, to-wit:

DEFENDANT'S EXHIBITS No. 12 AND 13.

"Fidelity Trust Company.

$279 X. Indianapolis, Ind., Oct. 21, 1910. No. 2310.

Pay to the order of Frank S. Fishback, Treasurer, $279.05 Two hundred seventy-nine and 5/100 Dollars.

Fidelity Trust Company Indianapolis.

W. M. FOGARTY, *President.*
TIMOTHY P. SEXTON,
Ass't Sec'y & Treas.

To The Capital National Bank, Indianapolis, Ind.

'For Deposit. F. S. Fishback, Treas. Marion County.

Pay to the Order of Merchants National Bank, Indianapolis, Indiana. Oct. 22, 1910. The Indiana Trust Company. Frank Martin, Treasurer.

Paid Oct. 24, 1910. A. K. Merchants Nat'l Bank, Indianapolis, Ind.'

16 'Redemption Quietus.

County Auditor's Office.

Indianapolis, Ind., Oct. 21st, 1910.

This is to certify, That Wm. V. Rooker has filed in the Auditor's fice of said County, the Treasurer's receipt for Ninety-nine & 2 100 Dollars, for the redemption of the following described Real state in Marion County, Indiana, to-wit:

Part of section or subdivision.	Sec.	Town.	Range.	Acres.
W. 1/4 N. W. 1/4	34	17	4	40

42.34.
36.18.

Bought by Meek & Osborn on the 14 day of February, 1910, and d in the name of Wm. V. Rooker on Certificate No. 48501 for es of 1908 and 1909 and I hereby certify that said redemption s been entered in Sale Book, Vol. 17, Page 9.

Witness my hand and official seal, this 21 day of Oct. 1910.

899.12.

ALBERT SAHN,
R.,
County Auditor.'

'Redemption Quietus.

County Auditor's Office.

Indianapolis, Ind., Oct. 21st, 1910.

This is to certify, That Wm. V. Rooker has filed in the Auditor's fice of said County, the Treasurer's receipt for Fifty eight 7/ 100 Dollars, for the redemption of the following described Real state in Marion County, Indiana, to-wit

Part of section or subdivision.	Sec.	Town.	Range.	Acres.
E. 1/4 N. E. 1/4	33	17	4	40

2900 value.
1908—23.20.
1909—23.40.

Bought of J. B. Bilderback on the 14 day of February, 1910, and d in the name of Wm. V. Rooker on Certificate No. 48416 for es of 1908 and 1909 and I hereby certify that said redemption s been entered in Sale Book, Vol. 17, Page 4.

Witness my hand and official seal, this 21 day of Oct. 1910.

678.89.

ALBERT SAHN,
R.,
County Auditor.'"

Q. Now you say the check with which you paid these included some other taxes that your company paid?

A. Yes, itemized on the back of the check.

Q. There being an item of another party's taxes in it?

A. Yes.

Q. I now hand you a tax receipt which is identified as Exhibit No. 14, Mr. Fogarty, you may state whether or not you paid that?

A. Yes, sir.

(By Mr. Rooker:) The plaintiffs will admit that payment, your Honor.

The defendant, by counsel, upon the admission of the plaintiffs, introduced in evidence and read to the Court the voucher
618 which has been marked by the reporter for identification as Defendant's Exhibit No. 14, showing payment of $11.60 for taxes on forty acres in Washington Township, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 14.

Receipt No. 1214.

"Do not separate. Return both receipts when you pay.
Duplicate No. 7. Book —. Wash. Tp.
Auditor's assessment.

Treasurer's Office,

Indianapolis, Ind., ——, 1911.

Received of Fidelity Trust Co. Tr. For State, County, Township and City of Indianapolis Taxes for year 1910, First Inst.
This Receipt of no value unless Stamped Paid.

Rec'd 4-21-1911.

F. S. FISHBACK,
Treas.
FAY WRIGHT.

Description.	Net valuation.	Amount to pay.
S. E. ¼ N. E. ¼ 33-17-4, 40 acres.....	2,000	11.60

Special. Duplicate.
F. M.
1st Installment Delinquent after 1st Monday in May 2nd Installment Delinquent after 1st Monday in November. Taxpayers should examine receipt and see that descriptions are correct.
See that your Personal Property and Poll is Paid.

F. S. FISHBACK,
Treas."

The defendant, by counsel, now offers to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 15.

The plaintiffs, by counsel, admit the payment of taxes represented by voucher marked Defendant's Exhibit No. 15.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's exhibit No. 15, which exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 15.

Receipt No. 12146.

"This receipt must be returned when you pay.
Duplicate No. 8992. Do not detach Duplicate.
This receipt of no value unless stamped 'Paid.'
Rate: 1st Half, 96*c*: 2d Half, 82*c*; total, $1.78: Poll, $2.50.

Lawrence Township.

Taxes for the Year 1910.

Treasurer's Office,

Indianapolis, Ind., ——— —, 1911.

Received of Fidelity Trust Co. For the first installment of State, County and Township Taxes on the following described property:

Dora E. Rooker Tr.

Description	Sec. or lot.	Acres.	Net valuation.	Current.
6|21$_2$. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	31	40	2,900	$27.84

[Stamped:] Paid. Fishback, County Treas.

Preserve this receipt.

F. S. FISHBACK,
County Treasurer.

Q. I hand you, Mr. Fogarty, Exhibit No. 16; you may state whether or not that quietus was issued to you by the Treasurer of Marion County?

A. The Auditor.

Q. The Auditor of Marion County?

A. Yes.

By Mr. Rooker:

Q. And on what date?

A. November 9, 1912.

Q. And you may state whether or not you paid in to the Treasurer's office the amount represented by it?

A. Yes.

Q. And for what purpose?

A. For redemption of Marion County lands in the Rooker estate, known as the south-west quarter of the north-west quarter of thirty-seven, seventeen, four.

Q. That is known as the Marion County land?

A. Yes.

The plaintiffs, by counsel, object to that, your Honor, for
621 the reasons before stated, that this payment was made after the Trustee had resigned, and after the Trustee was asserting an interest in this estate hostile to the trust; that this payment was made in aid of the Trustee's wrongful claim of title in themselves, and further that, if this could be admissible in any sum, it could be admissible only in such sum as would have been a liability against the estate if the Trustee had performed its duty and paid the taxes before the penalty was attached.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

Q. Now you paid this ninety-one dollars and eighty-five cents, did you, to the Treasurer of Marion County?

A. Ninety-two dollars and ten cents.

Q. Ninety-two dollars and ten cents?

A. Yes.

The defendant, by counsel, now offers to introduce in evidence the quietus which has been marked by the reporter for identification as Defendant's Exhibit No. 16.

The plaintiffs, by counsel, ask the court for a reserved question of law, and we make the objection that, at the time this payment was made, the Trustee had recently repudiated the trust, and
622 was foreclosing a mortgage against this property and that this payment was made, if made at all, in aid of the Trust Company's right as a mortgagee, and not in performance of its duty as Trustee; that this claim as mortgagee was an unlawful claim, and that this payment was made by the Trust Company, if made at all, in aid of its own wrong.

The Court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 16, which exhibit is in the words and figures following, to-wit

DEFENDANT'S EXHIBIT No. 16.

"*Redemption Quietus.*

County Auditor's Office.

Indianapolis, Ind., Nov. 9th, 1912.

This is to certify, That Fidelity Trust Co. Tr. has filed in the uditor's Office of said County, the Treasurer's receipt for Ninety-ne & 85 100 Dollars, for the redemption of the following described eal Estate in Marion County, Indiana, to-wit:

23

Part of section or subdivision	Sec.	Town	Range.	Acres.
W. ¼ N. W. ¼	34	17	4	40

Bought by Meek & Skiliman on the 12 day of February, 1912, nd sold in the name of Fidelity Trust Co. Tr. on Certificate *No.* =50918 for taxes of 1910 and 1911 and I hereby certify that said re-emption has been entered in Sale Book, Vol. 17, Page 138.

Witness my hand and official seal, this 9th day of Nov. 1912.

$91.85

W. T. PATTEN,
County Auditor."

Q. I hand you a tax receipt identified as Exhibit No. 17, Mr. Fogarty, and you may state for what tax that receipt shows payment?
A. Washington Township.

The Plaintiffs, by counsel, object.

A. Washington Township Rooker land.

The plaintiffs, by counsel, object for the reason the instrument is the best evidence.

Q. Now, did you pay the amount of money represented by that tax receipt?
A. Yes.
Q. And for the purpose of taxes on the Marion County land?
A. Yes, sir.

(By Mr. Rooker.) There is no objection to that.

The defendant, by counsel, then offered to introduce in evidence, and introduced in evidence and read to the court the receipt 24 which was marked by the reporter for identification as Defendant's Exhibit No. 17, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 17.

Receipt No. 207,835.

"This receipt must be returned when you pay.
Duplicate No. 1162. Do not detach duplicate.
This Receipt of no value unless stamped 'Paid.'

Washington Tp.

Treasurer's Office,

Indianapolis, Ind., —— —, 1912

Received of Fidelity Trust Co. Tr. Principal, Penalty, Interest and Costs of Taxes Delinquent for the year 1911 on Account of State County and Township on the following described property

Description.	Acres.	Net valuation.	Amount.	
49-21.				
N. E. ¼ 33-17-4.....	40	2,200	Taxes.....	24.42
			Penalty.....	2.44
				26.86
			Costs.....	.50
			Total.....	27.36

Delinquent.
F. W.

[Stamped:] Paid Carl Von Hake, County Treas.

625 Preserve this Receipt

CARL VON HAKE,
County Treasurer.

Q. Mr. Fogarty, I hand you Exhibit No. 18, and you may state who issued the voucher that contains the several receipts?
A. The Fidelity Trust Company, Trustee, by its proper officer.
Q. In whose favor?
A. In favor of the Treasurer of Marion County.
Q. For what purpose?
A. The payment of taxes on the Marion County Rooker lands.
Q. For the amounts stated?
A. Yes.

(By Mr. Rooker.) Now, as to these instruments, your Honor, which are fixed together by a metallic seal, the plaintiffs object, for the reason that this payment, if made at all, was made by the Fidelity Trust Company in its corporate capacity proper, and not by the Fidelity Trust Company as Trustee, and as made by the Fidelity Trust Company it was made in aid of its own wrong in asserting and protecting this asserted title adverse and hostile to the trust estate.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

626 The defendant, by counsel, then offered to introduce in evidence three separate sheets pinned together, which have been marked by the reporter for identification as Defendant's Exhibit No. 18.

The plaintiffs, by counsel, ask the court for a reserved question of law, and we objject to the introduction of the Exhibit now offered, for the reason that this payment, if made at all, was made by the Fidelity Trust Company in its corporate capacity proper, and not by the Fidelity Trust Company as Trustee, and as made by the Fidelity Trust Company it was made in aid of its own wrong in asserting and protecting this asserted title adverse and hostile to the trust estate.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 18, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 18.

"This receipt must be returned when you pay.

627 *Receipt 5696.*

Duplicate No. 1206. Do not detach duplicate.

Washington Tp.

Taxes for the Year 1912.

Treasurer's Office,

Indianapolis, Ind., ——— —, 1913.

Rate: 1st half, 68c; 2nd half, 53c; Total, $1.21; Poll, $2.00.

This receipt of no value unless Stamped Paid.

Received of Fidelity Trust Co. Tr. For the First Installment of State, County and Township Taxes on the following described property:

Description.	Sec. or lot.	Acres.	Net valuation.	Current.
15—32				
N. E. ¼	33	40	2,200	14.96

Preserve this receipt.

CARL VON HAKE,

County Treasurer."

[Stamped] Paid 5-5-13 Carl Von Hake County Treas.

Receipt No. 12624.

This receipt must be returned when you pay.
Duplicate No. 9994. Do not detach duplicate.
This receipt of no value unless stamped Paid.

Lawrence Township.

Taxes for the Year 1912.

Treasurer's Office,
Indianapolis, Ind., —— —, 1913.

Rate: 1st. half, 93c; 2nd. half, 74c; Total $1.67; Poll, $2.75.
Received of Fidelity Trust Co. Trs. For the First installment of
State, County and Township Taxes on the following de-
628 scribed property:

Description.	Sec. or lot.	Acres.	Net valuation.	Curren
168—10.				
Pt. N. W. ¼	34	40	3,000	27.90

Preserve this receipt.

CARL VON HAKE,
County Treasurer.

[Stamped:] Paid 5-5-13. Carl Von Hake, County Treas.

Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker
to Treasurer Marion County, Dr.

1st half taxes year 1912	14.90
" " " " "	27.90
	$42.80

(Forty two)

Approved for payment this 12 day of April 1913.
FIDELITY TRUST CO.,
Trustee.
By J. ALBERT SMITH,
Trust Officer.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., ——— —, 191-

Received of The Fidelity Trust Company, —, the sum of — Dollars in full settlement of the above account.
Paid May 5, 1913.

W. P. COSGROVE,
Cashier.

Voucher No. —. $42.86.

Bill of Treasurer Marion County on account of Dora E. Rooker.

Pay to the Order of Indiana Nat'l. Bank. Carl Von Hake, City and County Treasurer. Carl Von Hake.

Indiana National Bank, Indianapolis, Ind. Paid —— 13, 1913. ——, Receiving Teller.

Q. I hand you Exhibit No. 19, consisting of three separate sheets, Mr. Fogarty; you may first state who drew the check that contains?

The plaintiffs, by counsel, object, your Honor, the check ought to be shown, the contents, if admissible, the check would speak for itself.

The court sustained the objection of the plaintiffs, to which ruling of the Court the defendant, by counsel, then and there took an exception.

Q. Well, you may just state whether or not you paid that check?

The plaintiffs, by counsel, object to that, we don't object to his showing who issued it, but the proceeding on the check after issue; let him identify the check.

(By the Court:) Just give him the voucher and ask if he knows what it is.

A. Yes

Q. You know what it is, what is it?

A. Check payable to the Treasurer of Marion County, drawn by the Fidelity Trust Company by its proper officer

Q. And for what purpose?

A. Payment of tax certificates on Marion County lands.

The defendant, by Counsel, now offers to introduce in evidence papers which have been marked by the reporter for identification as Defendant's Exhibit No. 19, consisting of three separate parts, check and two tax certificates.

The plaintiffs, by counsel, object for the reason that is a general practice of the Fidelity Trust Company as Trustee and Fidelity Trust Company in its corporate capacity proper, and that there is no privity between the plaintiffs and those parties in this case, except the trust agreement, and that this memoranda shows on its face that it was a payment made after the Fidelity Trust Company as Trustee had resigned, and the Fidelity Trust Company in its corporate capacity proper had asserted in court that it was not a Trustee but a mortgagee, and had no duty in respect to this estate as Trustee; and that this payment, if made, was made in the aid of the wrong of the Fidelity Trust Company in setting up an adverse title; and further that, if made by the Trustee, the amount stated here is wrong for the reason that it appears that the Trustee had permitted these properties to be sold for taxes, which was a dereliction in duty, and that the penalties and other items

over and above the true amount of the original taxes might be a charge against the Trustee, but could not be a charge against the trust estate.

The Court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

Q. Mr. Rooker and Mrs. Rooker allowed these taxes to go delinquent, had they, Mr. Fogarty?

The plaintiffs, by counsel, object.

(By the Court:) When I overrule the objection and permit that to go in evidence, you put that in evidence and do not ask any more questions.

The defendant, by counsel, then introduced in evidence and read to the court defendant's Exhibit No. 19, which Exhibit is in the words and figures following, to-wit:

632 DEFENDANT'S EXHIBIT No. 19.

"Fidelity Trust Company.

No. 6144. Indianapolis, Ind., 2 5, 1914.

Pay to the Order of Carl Von Hake $123.73 One Hundred Twenty Three & 73/100 Dollars.

Not over one hundred thirty 130.

Fidelity Trust Company, Indianapolis.

Treasurer's check.

_____, *President.*

TIMOTHY P. SEXTON, *Asst. Secy.-Treas.*

Pay to the Order of Continental Nat'l Bank. 302 302. Carl Von Hake, City and County Treasurer. Carl Von Hake.

Continental Nat'l Bank. Paid Feb. 10, 1914. 2.

Paid.

No. 52828.

STATE OF INDIANA,
Marion County, ss:

I, W. T. Patten, Auditor of the County aforesaid, do hereby certify that at a Public Sale held by Carl von Hake, the Treasurer of said County of Marion, which was held on the second Monday of February, 1914, being the 9th day of said month within the hours prescribed by law, he did on said 9th day of February aforesaid, at the Court House door in the City of Indianapolis, in said County,

633 legal notice of such sale having been given, by publishing for three consecutive weeks, once in each week, immediately preceding the said 9th day of February, 1914, in two newspapers

of said County, having a general circulation, representing the two political parties casting the highest number of votes in said County at the last preceding election, and by posting up in a public and conspicuous place in each of the townships of said County, and at the court house door for the same length of time, sell to Fidelity Trust Co. for the sum of Eighty Dollars and 52 Cents, the following piece or parcel of land, situate in Marion County, State of Indiana to-wit: Being the South West Quarter of the North West Quarter Section 34 Township 17 Range 4 Containing 40 Acres: the said sum being the amount of taxes, penalty, interest, delinquent special assessments and costs due on the real estate above described for the years 1911 and 1912, said land being assessed and duly entered for taxation in the name of Fidelity Trust Co. Trustee, and the said Fidelity Trust Co. the purchaser above named, having filed in my office the receipt of the Treasurer aforesaid, for the full payment of said purchase money (he being the highest and best bidder for cash) will be entitled to a deed for the tract of land so purchased as above described, at the expiration of two years from this date, if the same shall not have been previously redeemed.

In witness whereof I have hereunto set my hand and seal, at the City of Indianapolis, this 9th day of February, 1914.

W. T. PATTEN,
Auditor Marion County."

831 STATE OF INDIANA,
Marion County, ss:

I, Carl von Hake, Treasurer of said County, do hereby guarantee that the taxes due upon the property named in the above certificate, for the years therein mentioned have never been paid by the owner nor by any person in ... behalf, and that the same were yet due and unpaid at the time of the sale thereof mentioned in said certificate.

CARL VON HAKE,
Treasurer Marion County.

No. 52828. Dup. No. 10161. Auditor Marion County to Fidelity Trust Co. S. W. 1/4 N. W. 1/4 34-17-4 40 acres. Tax Certificate Cancelled by Order No. —. Amount, $—. Date —— —, ——. Deed made to —— ——. Sale of 1914. $80.52. Sold in the Name of Fidelity Trust Co. Trustee.'

'No. 52835.

STATE OF INDIANA,
Marion County, ss:

I, W. T. Patten, Auditor of the County aforesaid, do hereby certify that a- a Public Sale held by Carl von Hake, the Treasurer 835 of said County of Marion, which was held on the second Monday of February, 1914, being the 9th day of said month within the hours prescribed by law, he did on said 9th day of February aforesaid, at the Court House door in the City of Indianapolis, in said County, legal notice of such sale having been given, by publishing for three consecutive weeks, once in each week, immediately

preceding the said 9th day of February, 1914, in two newspapers of said County, having a general circulation, representing the two political parties casting the highest number of votes in said County at the last preceding election, and by posting up in a public and conspicuous place in each of the townships of said County, and at the Court House door for the same length of time, sell to Fidelity Trust Co. for the sum of Forty-three Dollars and 21 Cents, the following piece or parcel of land, situate in Marion County, State of Indiana to-wit: Being the South East Quarter of the North East Quarter of Section 33 Township 17 Range 4 containing 40 acres; the said sum being the amount of taxes, penalty, interest, delinquent special assessments and costs due on the real estate above described for the years 1911 and 1912, said land being assessed and duly entered for taxation in the name of Fidelity Trust Co. Trustee and the said Fidelity Trust Co. the purchaser above named, having filed in my office the receipt of the Treasurer aforesaid, for the full payment of said purchase money (he being the highest and best bidder for cash) will be entitled to a deed for the tract of land so purchased as
636 above described, at the expiration of two years from this date, if the same shall not have been previously redeemed.

In witness whereof, I have hereunto set my hand and seal, at the City of Indianapolis, this 9th day of February, 1914.

W. T. PATTEN,
Auditor Marion County.

STATE OF INDIANA,
Marion County, ss:

I, Carl von Hake, Treasurer of said County, do hereby guarantee that the taxes due upon the property named in the above certificate, for the years therein mentioned have never been paid by the owner nor by any person in — behalf, and that the same were yet due and unpaid at the time of the sale thereof, mentioned in said certificate.

CARL VON HAKE,
Treasurer Marion County.

No. 52835. Dup. No. 5151-. Auditor Marion County to Fidelity Trust Co. S. E. ¼ N. E. ¼ 33-17-4 40 Acres. Tax certificate. Sale of 1914. $43.21. Sold in the Name of Fidelity Trust Co. Trustee.'"

637 Q. I hand you Exhibit No. 20, consisting of three sheets. Mr. Fogarty, you may state whether you know what it is?

A. Yes, sir.

Q. What is it?

A. Two tax receipts and voucher of payment drawn by Fidelity Trust Company, by its proper officers, to the Treasurer of Marion County.

Q. For what purpose?

A. On the Marion County Rooker lands.

Q. Taxes?

A. Yes.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 20.

The plaintiffs, by counsel, now ask the Court for a reserved question of law, and we object to this for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong and in violation of the trust agreement, and therefore is not a charge against the trust estate.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took
638 an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 20, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 20.

Receipt No. 5.

"Do not separate; return both receipts when you pay.
Duplicate No. 11272.
This receipt of no value unless stamped paid.

Lawrence Township.

Treasurer's Office,
Indianapolis, Ind., —— —, 1916.

Received of Fidelity Trust Co. Tr. Principal, Penalty, Interest and Costs of Taxes, Delinquent for the Year 1914, on Account of State, County and Township on the following described property:

Description.	Amount to pay.	
24-17.		
S.W. 1/4 N. W. 1/4 34-17-4 40 acres.	Tax	66.46
	Adv.	.40
		66.86
	Costs	.50
	Total	67.36

Delinquent.

ED. G. SOURBIER,
County Treasurer.

[Stamped:] Paid 2 14 16. Ed. G. Sourbier, County Treas.

Receipt No. 56.

"Do not Separate; return both receipts when you pay.
Duplicate No. 4644.
This receipt of no value unless Stamped Paid.

Washington Township.

Treasurer's Office,
Indianapolis, Ind., ——, 1916.

639 Received of Fidelity Trust Co. Tr. Principal, Penalty, Interest and Costs of Taxes, Delinquent for the Year 1914, on Account of State, County and Township, on the following described property:

Description.	Amount to pay.	
18-36.	Tax	31.64
S. E. ¼ N. E. ¼ 33-17-4 — 40 acres.	Adv	.40
		32.04
	Costs	.50
	Total	32.54

Delinquent.

ED. G. SOURBIER,
County Treasurer.

[Stamped] Paid 2 14 16 Ed G Sourbier County Treas

"The Fidelity Trust Company of Indianapolis to E. G. Sourbier Treas. Dr.

Taxes Pt. S. W. ¼ N. W. ¼ 34-17-4	67.36
S. E. ¼ N. E. ¼ 33-17-4, 40 acres	32.54
	99.90

Approved for payment this 14 day of February 1916.
FIDELITY TRUST CO.
Per TIMOTHY P. SEXTON.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

640 Paid Feb. 14, 1916. A. F. Eickoff, Cashier.
Voucher No. —. $99.90.
Bill of E. G. Sourbier, Treas., on account of Rooker.
Pay to the Order of Any bank or banker. Ed. G. Sourbier, City and County Treasurer. Ed. G. Sourbier.
Indiana National Bank, Indianapolis, Ind. Paid Feb. 16, 1916. ——— ———, Receiving Teller.'"

Q. I hand you voucher marked Exhibit No. 21, tell the court what that is, Mr. Fogarty?

A. This?

Q. What is it?

A. Tax receipt in Lawrence Township, Marion County, Marion County Treasurer; also voucher drawn by the Fidelity Trust Company by its proper officer, being to the Marion County Treasurer, $43.75, taxes on the Rooker lands.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 21.

The plaintiffs, by counsel, now ask the court for a reserved
641 question of law, and we object to this for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong and in violation of the trust agreement, and therefore is not a charge against the trust estate.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 21, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 21.

Receipt No. 20.

"Do not Separate: Return Both Receipts When You Pay.
Duplicate No. 11272.
16 A.
Rate, 1st Half, $1.25; Rate, 2nd Half, $1.05; Total, $2.30; Poll, $2.75.
This receipt of no value unless stamped paid.

Lawrence Township.

Taxes 1915.

642 Received of Fidelity Trust Co. Tr. For the First Installment of State, County and Township Taxes on the following described property:

Description.	Net valuation	Amount to pay.
24-17.		
S. W. ¼ N. W. ¼ 34-17-4, 40 acres....	3,500	43.75

ED. G. SOURBIER,
County Treasurer.'

Stamped: Paid. Ed. G. Sourbier, County Treas.

'The Fidelity Trust Company of Indianapolis to E. G. Sourbier, Treas., Dr.

Fidelity Trust Co., Tr. Dora E. Rooker.

224-17 Taxes S. W. ¼ N. W. ¼—34-17-4. 40 acres: Net val. 3,500. 43.75.

Approved for payment this 12 day of October 1916.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

FIDELITY TRUST CO.,
By T. P. SEXTON,
Asst. Sec'y-Treas.

Paid Oct. 14, 1916. A. F. Eickhoff, Cashier.

Voucher No. —. $43.75.

Bill of E. G. Sourbier, Treas., on account of Dora E. Rooker Mtg. Loan #343.

643 Pay to the Order of any bank or banker. Ed. G. Sourbier, City and County Treasurer. Ed. G. Sourbier.

Indiana National Bank, Indianapolis, Ind. Paid Oct. 17, 1916. —— ——, Receiving Teller.'"

Q. I hand you Exhibit marked No. 22, tell the Court whether you know what that is?

A. Yes.

Q. What is it?

A. Washington Township tax receipt issued by Marion County Treasurer and drawn by Fidelity Trust Company by its proper officers, in payment of the same in the sum of eighteen dollars and forty-eight cents, on the Rooker lands in Marion County.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 22.

The plaintiffs, by counsel, ask the court for a reserved question of law, and we object to this for the reason that, at the time this paymentment was made the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceed-
644 ings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate; and we object for the further reason that, at the time this payment was made, the title was a public record in the name of the Fidelity Trust Company under proceedings adverse to the trust estate.

The Court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel then introduced in evidence and read to the court Defendant's Exhibit No. 22, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 22.

Receipt No. 44.

Washington Township.

Taxes 1915.

"Do not separate: return both receipts when you pay.
Duplicate No. 4644.
Rate, 1st half, $.77; Rate, 2nd half, $.61; Total, $1.38; Poll, $2.00.
16-A.
This receipt of no value unless stamped Paid.

645 Received of Fidelity Trust Co., Tr. For the First Installment of State, County and Township Taxes on the following described property:

Description.	Net valuation.	Amount to pay.
48-36.		
S. E. ¼ N. E. ¼ 33-17-4, 40 acres.....	2,400	18.48

ED. G. SOURBIER,
County Treasurer.

Fidelity Trust Company of Indianapolis to E. G. Sourbier, Treas., Dr.

Fidelity Trust Co., Tr. Dora E. Rooker.

1836. S. E. ¼ N. E. ¼ 33-17-4, 40 acres, Net value 2,400, 18.48

Approved for payment this 13 day of October 1916.
FIDELITY TRUST CO.,
By T. P. SEXTON.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Paid Oct. 14, 1916. A. F. Eickhoff, Cashier.
Mtg. Loans $371.
Voucher No. —. $18.48.
Bill of E. G. Sourbier Tr. on account of Dora E. Rooker.

646 Pay to the Order of any bank or banker. Ed. G. Sourbier, City and County Treasurer. Ed. G. Sourbier.
Indiana National Bank, Indianapolis, Ind. Paid Oct. 17, 1916.
——— ———, Receiving Teller."

Q. I hand you voucher marked Exhibit No. 23. Mr. Fogarty and you may tell the Court what it is?

A. Tax receipt from Marion County Treasurer for taxes Lawrence Township, Rooker lands, in Marion County, and voucher drawn by Fidelity Trust Company by its proper officers, payable to the Treasurer of Marion County for the sum of forty-four dollars and twenty-five cents, paid November 13, 1916.

Q. For what purpose?

A. Payment of taxes on the Rooker land.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 23.

The plaintiffs, by counsel, now ask the court for a reserved question of law, and we object to this for the reason that, at the time this payment was made, the Fidelity Trust Company was

647 claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong and in violation of the trust agreement, and therefore is not a charge against the trust estate.

The court overruled the objection of the plaintiff, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant by counsel, then introduced in evidence and read to the court defendant's exhibit No. 23, which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT No. 23.

Receipt No. 15.

"Do not separate; return both receipts when you pay.
Duplicate No. 11272.

Lawrence Township.

This receipt of no value unless Stamped Paid.

Treasurer's Office,
Indianapolis, Ind., —— —, 1916.

Received of Fidelity Trust Co. Trustee Principal, Penalty, Interest and Costs of Taxes, Delinquent for the Year 19— on Account of State, County and Township on the following described property:

Description.	Net valuation.	Amount to pay.	
224-17	.....	Tax	43.75
648			
S. W. ¼ N. W. ¼ 34-17-4	3,500	Pen.	.....
		Cost	50
		Total	44.25

ED. G. SOURBIER,
County Treasurer.

Delinquent.
J. B.
[Stamped:] Paid Ed. G. Sourbier, Co. Treas.

The Fidelity Trust Company of Indianapolis to Ed. G. Sourbier, Treas., Dr.

Dora E. Rooker, Mtg. Loans.

2½ Taxes S. W. ¼ N. W. ¼	43.75
Costs	50
	44.25

Approved for payment this 25 day of Oct. 1916.
FIDELITY TRUST CO.,
By T. P. SEXTON,
Asst. Secy. Treas.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Paid Nov. 13, 1916. A. F. Eickhoff, Cashier.
Dora E. Rooker Voucher No. —. $44.25.
Bill of E. G. Sourbier, Treas. on Account of Dora E. Rooker.

Pay to the order of any bank or banker. Ed. G. Sourbier, City and County Treasurer. Ed. G. Sourbier.
A. K. Paid Nov. 14, 1916. Merchants Nat'l Bank, Indianapolis, Ind."

649 Q. I hand you voucher marked Exhibit No. 24, Mr. Fogarty, tell the Court what it is?

A. Tax receipt Marion County Treasurer, Washington Township taxes on Rooker land in the sum of eighteen dollars and forty-five cents, voucher drawn by Fidelity Trust Company by its proper officers, in payment of same, paid November 13, 1916.

The defendant, by counsel, offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 24.

The plaintiffs, by counsel, ask the court for a reserved question of law, and we object to this for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate; and we object for the further reason that the identification of this instrument is not complete, for the reason that the witness describes it as being a receipt for taxes on the Rooker land, when the instrument itself shows it is land of the Fidelity Trust Company which at
650 that time held title to these lands under proceedings adverse to the trust estate.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 24, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 24.

Receipt No. 382.

"Do not separate; return both receipts when you pay.
Duplicate No. 4644.

Washington Township.

This receipt of no value unless stamped paid.

Treasurer's Office,
Indianapolis, Ind., —— —, 1916.

Received of Fidelity Trust Co. Trustee Principal, Penalty, Interest and Costs of Taxes, Delinquent for the Year 1915, on Account of State, County and Township, on the following described property:

Description.	Net valuation.	Amount to pay.
48–36.	2,400	Tax 17.95
S. E. ¼ N. E. ¼ 33–17–4.		Costs..... .50
		Total.....$18.45

J. B.
Delinquent.

ED. G. SOURBIER,
County Treasurer.

[Stamped:] Paid. Ed G. Sourbier, Co. Treas.

651 The Fidelity Trust Company of Indianapolis to E. G. Sourbier, Treas., Dr.

Dora E. Rooker.

2½ S. E. ¼ N. E. ¼ 33-17-4	17.95
	.50
	18.45

Approved for payment this 25 day of October 1916.
FIDELITY TRUST CO.,
By T. P. SEXTON.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Paid Nov. 13, 1916. A. F. Eickhoff, Cashier.
#371. Dora E. Rooker. Voucher No. —. $18.45. Paid 11, 15, 16.
Bill of E. G. Sourbier, Treas. on account of Dora E. Rooker.

Pay to the order of any bank or banker. Ed. G. Sourbier, City and County Treasurer. Ed. G. Sourbier.

A. K. Paid Nov. 14, 1916. Merchants Nat'l Bank, Indianapolis, Ind.

Q. I hand you Exhibit No. 25, Mr. Fogarty; tell the court what it is?

A. Receipt for taxes from the Treasurer of Hamilton County and check drawn by the Fidelity Trust Company by its proper officers in payment of the same in the sum of seventy-three dollars
652 and fifty-three cents, taxes on the Rooker lands in Hamilton County, May 17, 1910.

The plaintiffs, by counsel, admit that on the 17th day of May, 1910, the Trustee paid taxes to the amount of seventy-three dollars and fifty-three cents on lands embraced in the trust estate.

It is admitted that the defendant Fidelity Trust Company, as Trustee, on October 14, 1910, paid the Treasurer of Hamilton County sixty-four dollars and thirty-three cents for taxes on the Hamilton County lands.

It is also admitted that on April 29, 1911, they paid the Treasurer of Hamilton County the sum of one hundred fifty-nine dollars and thirty-four cents for the same purpose.

Q. I hand you a paper marked Exhibit No. 26; tell the Court what it is, Mr. Fogarty?

The plaintiffs, by counsel, object to the question, if the court please, for the reason it states what legal instrument it is.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

A. It is a receipt for taxes by the Treasurer of Hamilton County, taxes paid the Trust Company, paid by the Fidelity Trust
653 Company, voucher drawn by its proper officer, in the sum of four hundred forty-four dollars and thirty-four cents, November 9, 1912.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 26.

The plaintiffs, by counsel, object to this for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate, and we ask for a reserved question of law on this.

The court overruled the objection of the plaintiffs, to which ruling of the court, the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court defendant's Exhibit No. 26, which Exhibit is in the words and figures following, to-wit:

654 DEFENDANT'S EXHIBIT No. 26

Delinquent Taxes for 1910 & '11.

Noblesville Township.

Treasurer's Office.

No. 252.

Noblesville, Hamilton County, Ind., 11-4, 1912. $441.34.

Received of Fidelity Trust Co. (Tru. D. E. Booker the sum of Four Hundred Forty Four Dollars and 34 100 Cents In full for State, County, School, Special School Township, Gravel Road Construction and Road Tax, delinquent for the year 191.., on Personal Property, and on the following described Real Estate:

Description of land.	Sec.	Town.	Range.	Acres.	Hun.
P. S. E.	12	18	4	59	60
P. W. S. W.	7	18	5	48	
W. N. W.	18	18	5	94	50
P. N. E.	13	18	4	65	

J. E. BERT,
Treasurer of Hamilton County
By H. D. P.
Deputy.

The Fidelity Trust Company of Indianapolis to J. E. Bert, Treasurer, Hamilton County, Dr.

Fidelity Trust Co., Tr. Dora E. Booker.

Fall taxes as per attached Statement. 441.34.
Approved for payment this 8 day of November, 1912.
FIDELITY TRUST CO.
By TIMOTHY P. SEXTON,
Asst. Sec'y.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity
655 Trust Company of Indianapolis.

Indianapolis, Ind., Nov. 9, 1912.

Received of The Fidelity Trust Company the sum of Four Hundred Forty four 34 100 Dollars in full settlement of the above account.

JOHN E. BERT,
Treas. Hamilton Co., Ind.

$444.34.
Paid 11, 11, '12.
Voucher No. —. $444.34.
Bill of Hamilton County fall taxes on account of Dora E. Rooker.
Paid 11, 11, '12.
Pay to the Order of Citizens State Bank, Noblesville, Ind. J. E. Bert, Treasurer Hamilton County.
Pay to the Order of Indiana National Bank, Indianapolis, Ind. All Prior endorsements guaranteed. Citizens State Bank, Noblesville, Ind. 71–343. E. S. Baker, Cashier. 71–343.
Indiana National Bank, Indianapolis, Indiana. Paid Nov. 12, 1912. ——— ———. Cash Item Teller."

656 Q. I hand you Exhibit marked 27, and tell the court what that instrument is?

A. Receipt for taxes issued by the Treasurer of Hamilton County, Indiana, for voucher drawn by the Fidelity Trust Company, of Marion County, Indiana, by its proper officers, in the sum of one hundred thirty-six dollars and twenty-nine cents, paid May 3, 1913, on the Rooker lands in Hamilton County.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 27.

The plaintiffs, by counsel, object to the introduction in evidence of this exhibit for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate, and we ask for a reserved question of law on this.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

657 The defendant, by counsel, then introduced in evidence and read to the court the Defendant's Exhibit No. 27, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 27.

"*Receipt No. 259.*

Noblesville Township.

Duplicate No. —.

Noblesville, Hamilton County, Ind., 5 5 1913. $136.29.

Received of Fidelity Trust Co. (Trustee) the sum of One Hundred Thirty Six 29 100 Dollars, in Full for the First Installment of State, County, Township and Corporation Taxes for the Year 1912, on $16,420. of Personal Property, and the following described Real Estate:

Description.	Sec.	Twp.	Range.	Acres.	Hds.	Net valuation of real estate.
P. S. E.	12	18	4	59	60	
P. W. S. W.	7	18	5	48		
W. N. W.	18	18	5	91	50	
P. N. E.	13	18	4	65		15,090

Original.

J. E. BERT,
Treasurer Hamilton County.

The Fidelity Trust Company of Indianapolis, Trustee for Dora E. Rooker, to Treasurer of Hamilton County, Dr.

658 1913, May 3rd, to pay taxes on real estate owned in Hamilton County by Fidelity Trust Company as Trustee for Dora E. Rooker in the sum of $136.29.

Approved for payment this 3rd day of May 1913.
FIDELITY TRUST COMPANY,
Trustee.
By WILLIAM M. FOGARTY,
Prest.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., May 3rd, 1913.

Received of the Fidelity Trust Company, Trustee for Dora E. Rooker the sum of One Hundred Thirty-six 29 100 Dollars in full settlement of the above account.
$136.29.

JOHN E. BERT,
County Treasurer.

Voucher No. —. $136.29.
Bill of Treasurer of Hamilton County on account of Dora E. Rooker.
Paid 5, 19, '13.

Pay to the order of any bank, banker or trust Co. All prior endorsements guaranteed. Citizens State Bank, Noblesville, Ind. E. S. Baker, Cashier. 71-343. 71-343.
Pay to the Order of Citizens State Bank, Noblesville, Ind. J. E. Bert, Treasurer Hamilton County.
Paid May 17, 1913. Fletcher American Nat'l Bank of Indianapolis.' "

659 Q. I hand you exhibit No. 28; tell the court what it is Mr. Fogarty?

A. Quietus issued by the County Auditor of Hamilton County, June 30, 1916, and check drawn by Fidelity Trust Company of Indianapolis, by its proper officers, payable to the Treasurer of Hamilton County, in the sum of eight hundred fifty-five dollars and ten cents on account of taxes on Rooker land in Hamilton County.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 28.

The plaintiffs, by counsel, object to this for the reason that, at the time of payment of these taxes, the title to this land was of record in the name of the Fidelity Trust Company in its corporate capacity proper, under judicial proceedings adverse to the trust estate; that this payment was made in aid of the Trust Company's own wrong; and we make the further objection that the trust estate in no event could be chargeable with penalties prescribed by law for delinquency in non-payment of taxes at the proper time, and we ask the court for a reserved question of law on this.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there
660 took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 28, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 28.

Quietus.

Office of County Auditor.

"No. 1183. Noblesville, Ind., 6, 30, 1916. $855.10.

I hereby Certify that Fidelity Trust Co. of Rooker Sale has filed in my office the receipt of the Treasurer of Hamilton County, Indiana, for Eight Hundred Fifty-five 10/100 Dollars on account of Tax Sale, Rooker Land.

W. O. HORTON,
Auditor Hamilton County, Ind.

Fidelity Trust Company.

Indianapolis, Ind., June 29, 1916. No. 11331.

Pay to the Order of L. G. Heiny, Treas. Hamilton Co., $855.10. Eight Hundred Fifty Five & 10/100 Dollars.
Not over One Thousand $1,000.
Fidelity Trust Company, Indianapolis.

TIMOTHY P. SEXTON,
Ass't Sec'y-Treas.

Treasurer's Check.

Pay to the order of any bank or trust Co. L. G. Heiny, Treas.

661 Pay to the Order of Indiana National Bank, Indianapolis, Ind. All prior endorsements guaranteed. Citizens State Bank, Noblesville, Ind. E. S. Baker, Cashier. 71-343. 71-343. Indiana National Bank, Indianapolis, Ind. Paid Jul. 5, 1916. Paid 7. 5. '16."

Q. I hand you exhibit No. 29, Mr. Fogarty, you may tell the court what it is?

A. Delinquent tax receipt issued by the Treasurer of Hamilton County, Indiana, for the sum of three hundred nineteen dollars and fifteen cents, payment of taxes on the Hamilton County Rooker lands, drawn in voucher by the Fidelity Trust Company of Indianapolis, by its proper officers October 11 1916.

The defendant, by counsel, now offers to introduce in evidence paper which has been marked by the reporter for identification as Defendant's Exhibit No. 29.

The plaintiffs, by counsel, object to this for the reason that, at the time of payment of these taxes, the title to this land was of record in the name of the Fidelity Trust Company in its corporate capacity proper, under judicial proceedings adverse to the trust estate; 662 that this payment was made in aid of the Trust Company's own wrong; and we make the further objection that the trust estate in no event could be chargeable with penalties prescribed by law for delinquency in non-payment of taxes at the proper time; and we ask the court for a reserved question of law on this.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 29, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 29.

"Delinquent Taxes for 1915.

Noblesville Township.

Treasurer's Office.

No. 267.

Noblesville, Hamilton County, Ind., 10-14-1916. $319.15.

Received of Fidelity Trust Co. Trustee D. E. Rooker the sum of Three hundred nineteen Dollars and 15 Cents, in full for State, County, School, Special School Township, Gravel Road Construction and Road Tax, delinquent for the year 1915, on Personal
663 Property, Poll, and on the following described Real Estate:

Description of land.	Sec.	Town.	Range.	Acres.	Hund.
P. S. E.	12	18	4	59	60
P. W. S. W.	7	18	5	48	
W. N. W.	18	18	5	91	50
P. N. E.	13	18	4	65	

L. G. HEINY,
Treasurer of Hamilton County.

The Fidelity Trust Company of Indianapolis to L. G. Heiny, Treas. Hamilton County, Dr.

Fidelity Trust Co., Tr. D. E. Rooker

Approved for payment this 13 day of October 1916.
#267. 319.15.

FIDELITY TRUST CO.,
By T. P. SEXTON,
Asst. Sec'y-Treas.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Noblesville, Ind., Oct. 14th, 1916.

Received of The Fidelity Trust Company, the sum of Three Hundred Nineteen (fifteen cents) Dollars in full settlement of the above account.

$319.15. L. G. HEINY,
Co. Treas., Hamilton Co.

Paid 10, 17, '16.
Mtg. Loans #316.
Voucher No. —. $319.15.
Bill of L. G. Heiny, Treas. Hamilton Co. on account of
664 Dora E. Rooker.

Pay to the order of any bank or trust Co. L. G. Heiny, Treas. Pay to the order of Indiana National Bank, Indianapolis, Ind. All prior endorsements guaranteed Citizens State Bank, Noblesville, Ind. E. S. Baker, Cashier. 71-343. 71-343. Indiana National Bank, Indianapolis, Indiana. Paid Oct. 17, 1916.'"

Q. I hand you defendant's Exhibit No. 30, Mr. Fogarty, you may tell the court what that is?

A. Check drawn against Fidelity Trust Company by Henry Seyfried, chief counsel of Fidelity Trust Company, Indianapolis, dated June 25, 1913, payable to Will F. Wall, Clerk, four hundred forty-two dollars and forty-two cents, account for Dora Rooker, payment judgment, interest and costs in case of Ludovice Celadon Co. endorsed by Will F. Wall, Clerk, paid by Fidelity Trust Company June 26, 1913.

Q. Do you know whether this judgment was the foreclosure of mechanic's lien against the Hamilton County Rooker lands, Mr. Fogarty, or not?

The plaintiffs, by counsel, object; after he has identified it,
965 we submit he should offer it in evidence.

The court overruled the objection of the plaintiffs to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

A. That is my recollection.

Q. And is this the same case that was appealed by Mrs. Rooker to the Appellate Court?

A. In which the surety bond was involved?

Q. Yes?

A. That is my recollection of it.

Q. And is Will F. Wall the clerk of the Hamilton Circuit Court?

A. He was at that time.

Q. And you paid this in satisfaction of that judgment on that mechanic's lien?

A. Yes.

The defendant, by counsel, now offers to introduce in evidence the check which has been marked by the reporter for identification as Defendant's Exhibit No. 30.

The plaintiffs, by counsel, object to this for the reason this item is embraced in a previous charge of five hundred and five dollars to the Illinois Surety Company.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

966 The defendant, by counsel, then introduced in evidence and read to the court the Defendant's Exhibit No. 30, which Exhibit is in the words and figures, following, to-wit:

DEFENDANT'S EXHIBIT No. 30.

"Fidelity Trust Company.

Indianapolis, Ind., June 25, 1913. No. —.

Pay to the Order of Will F. Wall, Clerk $412.42 Four Hundred Forty Two 42 100 Dollars.

HENRY SEYFRIED,
Gen'l Counsel.

Fidelity Trust Company, Indianapolis.
a/c Dora E. Rooker in payt. Judgt. Int. & Costs in case of Ludovice Celadon Co. 'Will F. Wall, Clerk.'
Pay to the Order of the Indiana National Bank, Indianapolis Ind. All Prior Endorsements Guaranteed. American National Bank Noblesville, Ind. 71-313. G. S. Christian, Cashier. 71-313
Indiana National Bank, Indianapolis, Indiana. Paid Jun. 25 1913. —— ——, Cash Item Teller."

667 Q. I hand you Exhibit No. 31. Mr. Fogarty, you may tell the court what that is?

A. Check drawn against the Fidelity Trust Company by Henry Seyfried, general counsel of the Fidelity Trust Company, dated June 25, 1913, payable to J. Fred France, Clerk, in the sum of twenty-eight dollars and seventy cents, account Dora E. Rooker in Appellate Court Ludowici-Celadon Company costs, endorsed by J. Fred France Clerk, paid by Fidelity Trust Company.

The defendant, by counsel, now offers to introduce in evidence the check which has been marked by the reporter for identification as Defendant's Exhibit No. 31.

By Mr. Rooker: On the statement that there is a credit as allowed we waive objection.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 31, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 31.

"Fidelity Trust Company.

Indianapolis, Ind., June 25, 1913. No. —.

Pay to the Order of J. Fred France $28.70 Twenty-eight 70 100 Dollars.

HENRY SEYFRIED,
Gen'l Counsel.

Fidelity Trust Company, Indianapolis.

a c Dora E. Rooker Costs in Appellate Court in Ludowici-Celadon Co. J. Fred France, Clerk.
Pay to the order of any bank or trust co. Wm. H. Vollmer, Treas. State of Indiana.
National City Bank, Indianapolis, Ind. Paid Jun. 30, 1913.
Paid 6, 30, 13. ——— ———, Receiving Teller.'

'WILLIAM V. ROOKER and DORA E. ROOKER

vs.

LUDOWICI-CELADON COMPANY.

Appeal from Hamilton Circuit Court.

Clerk's Office, Appellate Court of Indiana.

28.70 Indianapolis, June 25th, 1913.

Received of Fidelity Trust Company Twenty-eight and 70/100 Dollars, in full payment of all costs in the above named cause in said Appellate Court.

J. FRED FRANCE,
Clerk Appellate Court.'

No. 7783.
Fe —, Page 107.

Q. I hand you Exhibit No. 32, consisting of two papers, and tell the Court what they are, Mr. Fogarty?

A. The first is receipted bill of Fidelity Trust Company for the sum of ninety-six dollars insurance written on properties in the Rooker trust; the second is voucher drawn by Fidelity Trust Company, by its proper officers, in like sum paid October 17, 1914.

The defendant, by counsel, now offers to introduce in evidence the papers which have been marked by the reporter for identification as Defendant's Exhibit No. 32.

The plaintiffs, by counsel, object to this, for the reason that, at the time this payment was made, the insurance being carried was being carried to protect the interest and estate of the Fidelity Trust Company in its corporate capacity proper, and not the interest of the trust, at which time the sequestered trust was carrying insurance on this identical property paying for it.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court the Defendant's Exhibit No. 32, which Exhibit is in the words and figures following, to-wit:

Defendant's Exhibit No. 32.

670 "Fidelity Trust Company, Trustee, In Account with Fidelity Trust Company.

156-158 East Market Street.

Insurance: Fire, Liability, Plate Glass, Burglary, Accident, Employers', Automobile, Boiler, and Tornado.

Both Phones 73.
4% Paid on Savings Accounts.

Real Estate, Loans, Rentals.

Indianapolis, September 16, 1914.

8-18-14. Insurance Underwriters #557,096, Amt. $1,900.00, Premium $22.80
8-18-14. Pacific Fire #380,732, Amt. $3,050.00, Premium 36.60
8-18-14. Globe & Rutgers #839,191, Amt. $3,050.00, Premium 36.60

96.00

Paid 9, 17, 14. Fidelity Trust Co., By M. R.

"The Fidelity Trust Company of Indianapolis to Fidelity Trust Co., Agt., Acct. Dora E. Rooker, Dr.

Acct. Dora E. Rooker.

1914.
Oct. 17. To Prem. on Insurance Underwriters' policy #557,096, $1,900.00 ..... 22.80
To prem. on Globe & Rutgers policy #839,191, 3,050.00 ..... 36.60
To prem. on Pacific Fire policy #380,732, 3,050.00 36.60

.....

671 Approved for payment this 17th day of Oct. 1914.
FIDELITY TRUST CO.
By W. M. FOGARTY,
Pres.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis

Indianapolis, Ind., Oct. 17, 1914.

Received of The Fidelity Trust Company, Acct. Dora E. Rooker the sum of Ninety Six and no 100 Dollars in full settlement of the above account.

$96.00.

FIDELITY TRUST COMPANY.
JAMES McNULTY,
Vice President & Mgr. Ins. Dept.

Voucher No. —. $96.00.
Bill of Dora E. Rooker on account of Ins. prem. Paid 10, 17, 14."

Q. I will ask you whether these policies were, part of them, delivered to the Indianapolis Life Insurance Company on their loan, do you know?

A. I don't recall.

Q. I hand you voucher marked Exhibit No. 33, Mr. Fogarty, tell the Court what it is?

A. One sheet is for receipted bill Indianapolis Life Insurance Company, for the sum of forty dollars and fifty cents for insurance in the Rooker trust, and the second is voucher drawn by Fi-
672 delity Trust Company, by its proper officers, for a like amount, paid the 28th of April, 1916.

The defendant, by counsel, now offers to introduce in evidence the papers which have been marked by the reporter for identification as Defendant's Exhibit No. 33.

The plaintiffs, by counsel, object to this for the reason that, at the time of this transaction, the title of this estate was of record in the Fidelity Trust Company under proceedings hostile to the trust, and that this arrangement between the Trust Company and the Indianapolis Life Insurance Company was a private arrangement, to which this trust estate was a stranger, and these charges could in no event be a charge against the trust estate, and that this insurance carried by the Trust Company was carried in aid of its own wrong under these proceedings hostile to this estate.

The Court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 33, which exhibit is in the words and figures following, to-wit:

673 DEFENDANT'S EXHIBIT No. 33.

"Indianapolis Life Insurance Co., in Account with Fidelity Trust Company.

Fidelity, Tr. for Rooker.

156-158 East Market Street.

Real Estate, Loans, Rentals.

Insurance: Fire, Liability, Plate Glass, Burglary, Accident, Employers', Automobile, Boiler, and Tornado.

Indianapolis, March 2, 1915.

Both Phones 74.
4% Paid on Savings Accounts.
Rental Dept.
8-18-14, Globe & Rutgers #831,169, Amt. $2,700.00, Premium $40.50.
Paid 4/28/16. FIDELITY TRUST CO.
By M. R.

"The Fidelity Trust Company of Indianapolis to Fidelity Trust Co. Agt., Acct. Dora E. Rooker, Dr.

Acct. Dora E. Rooker.

Apr. 28, 1916, to pay premium of 40.50 for policy #839,169 Globe and Rutgers, beginning Aug. 8-1914, expiring Aug. 8,
674 1917 as follows: $700.00 on frame building, 2,000.00 on barns, etc., Sec 34, Twp. 13, Lawrence, Range 4

Approved for payment this 28th day of April 1916.
FIDELITY TRUST COMPANY.
By W M FOGARTY,
Pres.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Apr. 28, 1916.

Received of The Fidelity Trust Company, the sum of Forty and 5-/100 Dollars in full settlement of above account.
$40.50

FIDELITY TRUST COMPANY.
JAMES McNULTY,
Vice President & Mgr. Ins. Dept.

Voucher No. —. $40.50.
Bill of Fidelity Trust Co. on account of Rooker Insurance. Paid 8, 28, 16.'"

Q. I hand you exhibit No. 31, Mr. Fogarty, you may tell the court what that is?

A. It is a draft drawn by the Fidelity Trust Company, by its proper officers, payable to the American Central Life Insurance Company, November 21, 1913, in the sum of fourteen thousand four hundred twenty-four dollars and fifty cents, endorsed by the American Central Life Insurance Company, paid.

675 Q. And for what purpose was the check drawn?

A. For the mortgage on Hamilton County lands in the Rooker matter, previously held by the American Central Life Insurance Company, and which had now become due and unpaid.

Q. Due and unpaid at that time?

A. Yes.

Q. And was that mortgage on the property at the time the deeds of conveyance were made?

A. Yes, sir, it was.

Q. And I will ask you whether or not, at that time, what, if any, representations the American Central Life Insurance Company were making as to any action they contemplated taking?

A. They stated to us they would foreclose the mortgage if we did not take it up.

The defendant, by counsel, now offers to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 31.

The plaintiffs, by counsel, object to that for the reason this was after the trustee had resigned, and that this payment was made in purchase of this mortgage and not in payment of it, and that the lien acquired by this purchase was afterwards asserted in a complaint to foreclose this mortgage, the plaintiff in the case being the Fidelity Trust Company, and the defendants being the plain-
676 tiffs in this case, and that that action is now pending, and that it was brought prior to the filing of this claim in this accounting proceeding; and we also ask for a reserved question of law.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

(By Mr. Seyfried:) Now as to that, we want the record to show that the statements made by counsel are not the fact, that there is no such suit pending.

The defendant, by counsel, then introduced in evidence and read to the court the defendant's Exhibit No. 31, which exhibit is in the words and figures following to wit:

DEFENDANT'S EXHIBIT No. 34.

"Fidelity Trust Company.

Indianapolis, Ind., November 21, 1913. No. 8567.

Pay to the Order of American Central Life Insurance Co. $14,424.50 Fourteen Thousand Four Hundred Twenty four and 50/100 Dollars.

W. M. FOGARTY,
President.
JAS. G. FLAHERTY,
Sec'y & Treas.

Fidelity Trust Company, Indianapolis.

677 Not over Sixteen Thousand $16,000.
To the Indiana National Bank, Indianapolis, Ind.

Indiana National Bank, Indianapolis, Ind. Paid Nov. 22, 1913. ——— ——, Receiving Teller.

416. 416. Pay to the Order of Indiana National Bank. American Central Life Insurance Co., by Geo. E. Hume, Treas."

Q. I hand you Exhibit No. 35, and you may state what that is?
A. That is voucher for the sum of fifty dollars drawn by Fidelity Trust Company, to Kane and Kane, Noblesville, Indiana, in payment for legal services in the Rooker litigations, dated November 25, 1912.
Q. Do you remember what litigation that was, Mr. Fogarty?
A. No, I don't, just off hand.
Q. Well, for the purpose of refreshing your recollection, I will ask you whether it was with reference to some mechanic lien suit?
A. My recollection is it was.
Q. In which your Company was made a defendant?
A. Yes.
Q. As trustee?
A. Yes, sir.

The defendant, by counsel, now offers to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 35.

678 The plaintiffs, by counsel, object to the introduction in evidence of this voucher, for the reason, as we will show by proper evidence, that these services were rendered in the foreclosure of the so-called Balke & Krauss lien; that in the case of Balke & Krauss lien Dora E. Rooker had, a number of months prior to this date, given the Balke & Krauss Company her proper order for the true amount of that indebtedness; that there was no defense to that indebtedness; that the Fidelity Trust Company as Trustee was so advised; that the Fidelity Trust Company required the Balke and Krauss Company to file this lien and prosecute this to judgment,

involving trust against the trust estate on both sides of the controversy, and requiring the plaintiffs in this case to employ counsel at their expense, and that, after these proceedings were had, the Trust Company purchased this judgment. Now, we are willing to admit as a liability in favor of the Trustee, on the Balke and Krauss claim, the sum of the original claim of the Balke and Krauss Company, but we insist the trust estate is not liable for the failure of the Trust Company to do its duty, and for any excess over 679 and above the amount of the original Balke and Krauss claim, we say that this is not proper evidence, and does not show a liability against the estate; and we ask the court for a reserved question of law on this.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court the Defendant's Exhibit No. 35, which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT No. 35.

The Fidelity Trust Company of Indianapolis to Kane and Kane, Attorneys, Noblesville, Indiana, Dr.

Trustee Dora E. & W. V. Rooker.

1912, Nov. 25, For legal services in re Dora E. Rooker and W. V. Rooker Trusteeship, 50.00.

Approved for payment this 25th day of November 1912.

FIDELITY TRUST COMPANY,
Trustee.
By WILLIAM M. FOGARTY,
President.

680 This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Nov. 26, 1912.

Received of The Fidelity Trust Company, Trustee Dora E. & W. V. Rooker the sum of Fifty and no/100 Dollars in full settlement of the above account.
$50.00.

KANE & KANE,
Attorneys.

Voucher No. —. $50.00.
Bill of Kane & Kane on account of Rooker Trust. Paid 11, 29, '12.
Kane & Kane, Attorneys.

Pay to the Order of the Indiana National Bank, Indianapolis, Ind. All Prior Endorsements Guaranteed. First National Bank, Noblesville, Ind. 71-344. D. Householder, Cashier. 71-344.

Indiana National Bank, Indianapolis, Indiana. Paid Nov. 27, 1912. ——— ———, Cash Item Teller.

Q. I hand you voucher No. 36, Mr. Fogarty, tell the court what that is?

A. It is duplicate receipted bill from the Hamilton Trust Company, of Noblesville, Indiana, for one dollar and fifty cents
681 for continuation of abstract for farm, with a voucher for the same drawn by its proper officers, October 4, 1910.

The defendant, by counsel, now offers to introduce in evidence the papers which have been marked by the reporter for identification as Defendant's Exhibit No. 36.

The defendant, by counsel, then introduced in evidence and read to the Court the Defendant's Exhibit No. 36, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT NO. 36.

"Noblesville, Ind., April 9th, 1910

M. Fidelity Trust Co., Indpls., Ind., to the Hamilton Trust Co., Dr.

Capital $50,000.

1910, April 9, Abstract work in reference to Rooker farm, 1.50.
Duplicate.
Received Payment Oct. 5, 1910.

THE HAMILTON TRUST CO.
By FRANK S. CAMPBELL,
Trust Officer.

"The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co., Dr.

1910, April 9, Continuation of Rooker abstract Hamilton
682 County farm, 1.50.

Approved for payment this 4 day of Oct. 1910.

FIDELITY TRUST CO.,
Trustee.
By W. M. FOGARTY,
Prest.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Oct. 4, 1910.

Received of The Fidelity Trust Company, Trustee Dora E. Rooker the sum of One and 50/100 Dollars in full settlement of the above account.

$1.50. FIDELITY TRUST CO.,
By W. M. FOGARTY,
Prest.

Paid 10, 4, '10.
Voucher No. ——. $1.50."

Q. I hand you Voucher No. 37, Mr. Fogarty, tell the Court what that is?

A. Duplicate receipted bill for two dollars and fifty cents from the Hamilton Trust Company, of Noblesville, Indiana, for continuation of abstract on Rooker farm, and voucher drawn by Fidelity Trust Company, of Indianapolis, by its proper officers, for a like sum, December 28, 1910.

Q. Paid by you?

A. Yes.

The defendant, by counsel, now offers to introduce in evidence papers which have been marked by the reporter for identification as Defendant's Exhibit No. 37.

The plaintiffs, by counsel, object, your Honor, for the reason this was no duty of the Trustee to bring down abstracts of title, that this was a continuation made after the Trustee had resigned, and was made for the ostensible purpose of obtaining the lien-holds in order that the Fidelity Trust Company might institute its suit as a mortgagee, to have the trust instrument declared a mortgage, and that the proceeding is entirely in contravention of the trust; and as to this we ask a reserved question of law.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court defendant's Exhibit No. 37, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 37.

"Noblesville, Ind., March 1, 1910.

Mr. Henry Seyfried, Indpls., Ind., to The Hamilton Trust Co., Dr.

Capital $50,000.

1910, March 1. Continuation of Abstract of title to Rooker farm for Fidelity Trust Co., 2.50.
Duplicate.

Received Payment Dec. 29, 1910.

THE HAMILTON TRUST CO.,
By FRANK S. CAMPBELL,
Trust Officer."

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co., Dr.

1910, March 1. Continuation of Abstract Rooker Hamilton County farm, 2.50.

Approved for payment this 28 day of Dec. 1910.
FIDELITY TRUST CO.,
Trustee.
By W. M. FOGARTY, *Prest.*

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Dec. 28, 1910

Received of The Fidelity Trust Company, Trustee Dora E. Rooker the sum of Two and 50/100 Dollars in full settlement of the above account.
$2.50.
FIDELITY TRUST CO.,
By W. M. FOGARTY, *Pres.*

Paid 12, 28, '10.
Voucher No. — $2.50

Q. I hand you Exhibit No. 38, tell the court what that is
685 Mr. Fogarty?

A. Duplicate receipted bill of Hamilton Trust Company of Noblesville, Indiana, for the sum of two dollars and fifty cents for abstract work in connection with the Rooker farm; the second sheet is a voucher for a like amount drawn by the Fidelity Trust Company, by its proper officers, dated December 20, 1911, and paid

The defendant, by counsel, now offers to introduce in evidence the papers which have been marked by the reporter for identification as Defendant's Exhibit No. 38.

The plaintiffs, by counsel, object to the introduction of this Exhibit, your Honor, for the reason this was no duty of the Trustee to bring down abstracts of title; that this was a continuation made after the Trustee had resigned, and was made for the ostensible purpose of obtaining the lienholds in order that the Fidelity Trust Company might institute its suit as a mortgagee, to have the trust instrument declared a mortgage, and that the proceeding is entirely in contravention of the trust; and as to this we ask the court for a reserved question of law.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

686 The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 38, which Exhibit is in the words and figures following, to-wit:

DEFENDANTS' EXHIBIT No. 38.

"Noblesville, Ind., Nov. 24, 1911.

Mr. Fidelity Trust Co., Indpls., Ind., to The Hamilton Trust Co., Dr.

Capital $50,000.

1911, Nov. 24. Abstract work in connection with Rooker farm, $2.50.
Duplicate.

Received Payment Dec. 21, 1911.
THE HAMILTON TRUST CO.,
By FRANK S. CAMPBELL,
Trust Officer.

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co., Dr.

1911, Nov. 24. Continuation of Rooker abstract Hamilton County farm, -2.50.
Approved for payment this 20 day of Dec' 1911.
FIDELITY TRUST CO.,
Trustee
By W. M. FOGARTY,
Prest.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

687 Indianapolis, Ind., Dec. 20, 1911.

Received of The Fidelity Trust Company, Trustee Dora E. Rooker the sum of Two and 50/100 Dollars in full settlement of the above account.
$2.50.
FIDELITY TRUST CO.,
By W. M. FOGARTY,
Prest.

Paid 12. 20. '11.
Voucher No. —. $2.50.'"

Q. I hand you Exhibit No. 39, Mr. Fogarty, tell the court what that is?

A. Voucher drawn by the Fidelity Trust Company, of Indianapolis, by its proper officers, payable to the Hamilton Trust Company of Noblesville, in the sum of two dollars per continuation of abstract to Dora E. Rooker lands, dated June 22, 1912, and paid by the Trust Company on that date.

The defendant, by counsel, now offers to introduce in evidence the voucher which has been marked by the reporter for identification as Defendant's Exhibit No. 39.

The plaintiffs, by counsel, object to the introduction of this Exhibit, your Honor, for the reason this was no duty of the Trustee to bring down abstracts of title; that this was a continuation made after the Trustee had resigned, and was made for the ostensible purpose of obtaining the lienholds in order that the Fidelity Trust Company might institute its suit as a mortgage, to have the
688 trust instrument declared a mortgage, and that the proceeding is entirely in contravention of the trust; and as to this we ask the court for a reserved question of law.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 39, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 39.

"The Fidelity Trust Company of Indianapolis, Trustee Dora E. & W. V. Rooker, to The Hamilton Trust Co., Dr.

1912, June 18. To continuation of abstract of title to land of Dora E. Rooker. 2.00.

Approved for payment this 22nd day of June 1912.
FIDELITY TRUST CO.
By W. M. FOGARTY,
Prest.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust
689 Company of Indianapolis.

Indianapolis, Ind., June 22, 1912.

Received of The Fidelity Trust Company, Trustee Dora E. & W. V. Rooker the sum of Two and no/100 Dollars in full settlement of the above account.
$2.00. THE HAMILTON TRUST CO.
Per E. L. STURDEVANT.
Secy.-Treas.

Voucher No. —. $2.00.
Bill of Hamilton Trust Co. on account of Dora E. & W. V. Rooker.

Pay to the Order of National City Bank, Indianapolis. All Prior Endorsements Guaranteed. Hamilton Trust Co., Noblesville, Ind. Elmer L. Sturdevant, Sec'y.
National City Bank, Indianapolis, Ind. Paid Jun 22, 1912.
———, Receiving Teller. Paid 6-22-'12.

Q. I hand you Exhibit No. 40, tell the court what that is, Mr. Fogarty?

A. Receipt from F. S. Campbell, Secretary, duplicate receipt in the matter of the estate of Rooker, received of Fidelity Trust Company, Trustee, for continuation of abstract on Rooker lands, six dollars, and voucher drawn by Fidelity Trust Company, by its proper officers, for a like sum, paid April 14, 1913.

690 The defendant, by counsel, now offers to introduce in evidence the papers which have been marked by the reporter for identification as defendant's exhibit No. 40.

The plaintiffs, by counsel, object to the introduction of this Exhibit, your Honor, for the reason this was no duty of the Trustee to bring down abstracts of title; that this was a continuation made after the Trustee had resigned, and was made for the ostensible purpose of obtaining the lienholds in order that the Fidelity Trust Company might institute its suit as a mortgagee, to have the trust instrument declared a mortgage, and that the proceeding is entirely in contravention of the trust; and as to this we ask the court for a reserved question of law.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court Defendant's Exhibit No. 40 which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT NO. 40.

691 "STATE OF INDIANA,
Hamilton County, ss:

In the Matter of THE ESTATE OF ROOKER.

No. —. April 15, 1913. $6.00

Received of Fidelity Trust Company Trustee of said Estate Six Dolars. For continuation of abstract on Rooker land.
(Duplicate.)

THE HAMILTON ABSTRACT COMPANY,
By F. S. CAMPBELL, *Sec'y.*

The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Hamilton Trust Company, Dr.

To continuation of abstract land in Hamilton County, $6.00 (Six).

Approved for payment this 14 day of Apr. 1913.

FIDELITY TRUST CO.,
Trustee,
By J. ALBERT SMITH,
Trust Officer.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., Apr. 15, 1913.

Received of The Fidelity Trust Company, the sum of Six Dollars in full settlement of the above account.
$6.00.

THE HAMILTON TRUST CO.
Per E. L. STURDEVANT,
Sec'y-Treas.

Voucher No. —. $6.00.
Bill of Hamilton Trust Co. On account of Dora E. Rooker.

692 Pay Continental National Bank, 53 Indianapolis, or order
Prior Endorsements Guaranteed. Hamilton Trust Co. Noblesville, Ind. E. L. Sturdevant, Sec.-Treas.
Paid Apr. 16, 1913. Continental National Bank. Transit.'"

Q. I hand you voucher marked Exhibit No. 41, Mr. Fogarty, and tell the Court what that is?

A. Receipted bill of W. M. Coval and Sons, Indianapolis, to Fidelity Trust Company of Indianapolis, for abstract work on Rooker lands in Marion County, and voucher drawn by Fidelity Trust Company, by its proper officers, in payment of the same in the sum of three dollars and fifty cents, dated December 8, 1911 and paid.

The defendant, by counsel, now offers to introduce in evidence the papers which have been marked by the reporter for identification as Defendant's Exhibit No. 41.

The plaintiffs, by counsel object to the introduction of this exhibit, your Honor, for the reason this was no duty of the Trustee to bring down abstracts of title; that this was a continuation made after the trustee had resigned, and was made for the ostensible purpose of obtaining the lienholds in order that the Fidelity
693 Trust Company might institute its suit as a mortgagee, to have the trust instrument declared a mortgage, and that the proceeding is entirely in contravention of the trust; and as to this we ask the court for a reserved question of law.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court the Defendant's Exhibit No. 41, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 41.

"William M. Coval, Floyd C. Coval, Willis N. Coval, Wendell W. Coval.

Abstracts of Title and Conveyancing.

Established 1888.

Indianapolis, Ind., Mar. 6, 1912.

M Fidelity Trust Co. (Rooker) to W. M. Coval & Sons, Dr.

Nov. 24, 1911, Land in 33, 34–17–4, $3.50.
Duplicate.

Paid Dec. 8, 1912. W. M. Coval & Sons, Per H. E. D.'

94 'The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to Fidelity Trust Co., Dr.

1911, Dec. 8, to continuation of Rooker abstract, 3.50.

Approved for payment this 8 day of December 1911
FIDELITY TRUST CO.,
Trustee.
By W. M. FOGARTY,
Prest.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Indianapolis, Ind., December 8, 1911.

Received of The Fidelity Trust Company, Trustee Dora E. Rooker the sum of Three and 50/100 Dollars in full settlement of the above account.
$3.50.

FIDELITY TRUST CO.,
By W. M. FOGARTY,
Prest.

Voucher No. —. $3.50
Paid 12, 6, '11."

Q. I hand you voucher marked Exhibit No. 42. Mr. Fogarty, tell the court what it is?

A. Receipted bill from W. M. Coval and Sons to Fidelity Trust Company, Indianapolis, for abstract work on Rooker lands in Marion County, in the sum of two dollars and fifty cents, and accompanied by voucher for like sum drawn by the Fidelity Trust Company of Indianapolis, by its proper officers, and paid March 19, 1913.

695 The defendant, by counsel, now offers to introduce in evidence the papers which have been marked by the reporter for identification as Defendant's Exhibit No. 42.

The plaintiffs, by counsel, object to the introduction of this Exhibit, your Honor, for the reason this was no duty of the Trustee to bring down abstracts of title; that this was a continuation made after the Trustee had resigned, and was made for the ostensible purpose of obtaining the lienholds in order that the Fidelity Trust Company might institute its suit as a mortgagee, to have the trust instrument declared a mortgage, and that the proceeding is entirely in contravention of the trust; and as to this we ask the court for a reserved question of law.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court the Defendant's Exhibit No. 42, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 42.

696 "Indianapolis, Ind., March 18, 1913.

M Fidelity Trust Co. (*Rucker*) to W. M. Coval & Sons, Dr.

Land in 33, 34, 17, 4, $2.50

Credited to Account of W. M. Coval & Sons.
Paid 3, 19, '13.'

'The Fidelity Trust Company of Indianapolis, Trustee Dora E. Rooker, to W. M. Coval & Sons, Dr.

Continuation abstract, $2.50 (Two).

Approved for payment this 19 day of March 1913.
FIDELITY TRUST CO.,
By J. ALBERT SMITH,
Trust Officer.

This voucher, when dated and properly signed by the person in whose favor it is made, becomes a draft on the Fidelity Trust Company of Indianapolis.

Voucher No. —. $2.50.
Bill of Dora E. Rooker.
Paid 3, 19, '13.' "

Q. I hand you voucher No. 43, Mr. Fogarty, tell the court what that is?

A. This is several bills from the two Telephone Companies in Indianapolis. Long distance Telephone Companies, in which occurred

various items of charges made against the Trust Company during that time, covering all the bills, and voucher in payment of that amount chargeable against the Rooker trust, in the sum of one dollar and fifty cents, drawn by the Fidelity Trust mpany, by its proper officers, paid June 10, 1910.

Q. When was that Mr. Fogarty, the calls?

A. Well, one——

Q. Before April, May?

A. October, 1909, three in October, 1909, and January 1910, and bruary 1910, April 1910, May 1910.

Q. Now were those calls with reference to this business of this trust tate?

A. Yes.

The defendant, by counsel, now offers to introduce in evidence the pers which have been marked by the reporter for identification as efendant's Exhibit No. 43.

The plaintiffs, by counsel, object to that, your Honor, for the rea- n part of these bills are within the time, but we submit, and object these for the reason that these were part of the operating expenses f the Fidelity Trust Company; we are not obliged to pay their post- ge, stationery and light, or anything else, and that the office ex- enses of the Trust Company in managing this estate are provided be compensated by the fees which the Trust Company had, and e are no more obliged to pay their telephone bills than we are to ay the bookkeeper.

(By Mr. Seyfreid:) If there is any objection to it, we will ss waive it.

The defendant, by counsel, then withdrew the offer.

Q. I hand you voucher marked Exhibit No. 44, Mr. Fogarty, tell he Court what that is?

A. That is a bill, a copy of the advertisement, and voucher drawn the Fidelity Trust Company, by its proper officers, in the sum of ur dollars and ninety — payable to Indiana Catholic, printing and ublishing.

Q. What advertisement was that?

A. Advertisement of the Rooker lands in Marion County.

Q. Trying to sell them?

A. Yes.

The plaintiffs, by counsel, object, your Honor, for the reason the ust contract provided for the commission and for fees and other ompensation in the aggregate, and that it was no part of the estate.

The court sustained the objection of the plaintiffs, to which ruling f the court the defendant, by counsel, then and there took an ex- eption.

(Exhibit No. 44 Not offered.)

Q. I hand you Exhibit No. 45, Mr. Fogarty, and tell the court hat that is.

A. Marion County Treasurer's receipt for taxes in the sum of thirty-nine dollars and eighty-six cents for Rooker lands in Washington Township, paid June 14, 1917, by the Fidelity Trust Company.

699 The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 45.

The plaintiffs, by counsel, ask the court for a reserved question of law on this, and we object to the introduction of this Exhibit for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate; and that, at the time this payment was made, the title was a public record in the name of the Fidelity Trust Company under proceedings adverse to the trust estate.

The court overruled the objection of the plaintiff, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 45, which Exhibit is in the words and figures following, to-wit:

700 DEFENDANT'S EXHIBIT NO. 45.

Receipt No. 101.

Washington Township.

"Do not separate; return both receipts when you pay.
Duplicate No. 4774.
This receipt of no value unless stamped Paid.

Treasurer's Office,
Indianapolis, Ind., 1917

Received of Fidelity Trust Co. Principal, Penalty, Interest and Costs of Taxes, Delinquent for the Year 1916, on Account of State, County and Township, on the following described property:

Description.	Acres.	Net valuation.	Amount to pay.
50-24. Pt. S. E. ¼ N. E. ¼ 33-17-4	40	2,400	Tax—39.86
Total			39.86

Delinquent.

ED G. SOURBIER,
County Treasurer.

[Stamped:] Paid 6, 14, '17. Ed. G. Sourbier.

Q. I hand you Exhibit No. 46, Mr. Fogarty, tell the court what that is?

A. Marion County Treasurer's receipt for taxes paid, in the sum

of eighty-seven dollars and forty-six cents, Lawrence Township, Marion County, on Rooker lands, paid by the Fidelity Trust Company in Indianapolis.

The defendant, by counsel, now offers to introduce in evidence the receipt which has been marked by the reporter for identification as Defendant's Exhibit No. 66.

The plaintiffs' by counsel, ask the court for a reserved question of law on this, and we object to the introduction of this Exhibit
701 for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate; and that, at the time this payment was made, the title was a public record in the name of the Fidelity Trust Company under proceedings adverse to the trust estate.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendent's Exhibit No. 46, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 46.

Receipt No. 37.

Lawrence Township.

"Do not separate; return both receipts when you pay.
Duplicate No. 11499.
This receipt of no value unless stamped paid.

Treasurer's Office,
Indianapolis, Ind., 1917.

Received of Fidelity Trust Co. Principal, Penalty, Interest
702 and Costs of Taxes, Delinquent for the Year 1916, on Account of State, County and Township, on the following described property:

Description.	Acres	Net valuation	Amount to pay.
25-12.			
Pt. S. W. ¼ N. W. ¼ 34-17-4	10	3,500	Tax—86.96
			Costs— .50
Total			87.46

Delinquent.

ED. G. SOURBIER,
County Treasurer.

[Stamped:] Paid 6, 14, 17. Ed. G. Sourbier, Co. Treas."

Q. I show you Exhibit No. 47, Mr. Fogarty, tell the court what that is?

A. Marion County Treasurer's receipt for the sum of eighteen dollars and forty-eight cents, taxes Washington Township Rooker land, paid by the Fidelity Trust Company of Indianapolis, April 23, 1918.

The defendant, by counsel, now offers to introduce in evidence the receipt which has been marked by the reporter for identification as Defendant's Exhibit No. 47.

The plaintiffs, by counsel, ask the court for a reserved question of law on this, and we object to the introduction of this Exhibit in evidence for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the
703 trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate, and that at the time this payment was made, the title was a public record in the name of the Fidelity Trust Company under proceedings adverse to the trust estate.

The Court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 47, which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT NO. 47.

"*Receipt No. 532.*

Washington Township.

Taxes 1917.

Duplicate No. 4-23.

Do not Separate; return both receipts when you pay.
This receipt of no value unless stamped paid.

Rate, 1st Half, $8.77; Rate, 2nd Half, $8.70; Total, $17.47; Poll $2.00.

Treasurer's Office,

Indianapolis, Ind., —— —, 1918. 18-A.

Received of Fidelity Trust Co. for the First Installment of
[illegible] State, County and Township Taxes on the following described property:

Description.	Net valuation	Amount to pay.
7-36.		
N. E. ¼ 33-17-4. 40.....	2,400	18.48

ED. G. SOURBIER,
County Treasurer.

[Stamped | Paid 4. 23. '18. Ed. G. Sourbier, Co. Treas."

Q. I hand you Exhibit No. 48, Mr. Fogarty, tell the court what that is?

A. Marion County, Indiana, Treasurer's receipt for the sum of forty-three dollars and forty cents, Lawrence Town- taxes on Rooker land, paid by Fidelity Trust Company April 23, 1918.

The defendant, by counsel, now offers to introduce in evidence the receipt which has been marked by the reporter for identification Defendant's Exhibit No. 48.

The plaintiffs, by counsel, ask the court for a reserved question of law on this and we object to the introduction of this Exhibit in evidence for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate; and that, at the time this payment was made, the title was a public record in the name of the Fidelity Trust Company under proceedings adverse to the trust estate.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's exhibit No. 48, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 48.

"*Receipt No.* 195.

Lawrence Township.

Taxes 1917.

Duplicate No. 11025.

Do not separate; return both receipts when you pay.
This receipt of no value unless stamped paid.

Rate, 1st Half, $1.24. Rate, 2nd Half, $1.05. Total, $2.29. Poll, $2.50.

Treasurer's Office,

Indianapolis, Ind., —— —, 1918. 18-A.

Received of Fidelity Trust Co. for the First Installment of State, County and Township Taxes on the following described property:

706

Description.	Net valuation.	Amount to pay.
260-8. N. W. ¼ 34-17-4. 10.....	3,500	13.40

ED. G. SOURBIER,
County Treasurer.

[Stamped:] Paid 4, 23, '18. Ed. G. Sourbier, Co. Treas."

Q. I hand you Exhibit No. 49, tell the Court what that is?

A. Delinquent tax receipt for 1916 issued by the Treasurer of Hamilton County for four hundred forty-seven dollars and seventy-eight cents, taxes paid on Rooker lands in Hamilton County by the Fidelity Trust Company, of Indianapolis, June 16, 1917.

The defendant, by counsel, now offers to introduce in evidence the papers which have been marked by the reporter for identification as Defendant's Exhibit No. 49.

The plaintiffs, by counsel, ask the court for a reserved question of law on this, and we object to the introduction of this Exhibit in evidence for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate; and that at the time this payment was made, the title was a public record in the
707 name of the Fidelity Trust Company under proceedings adverse to the trust estate; and we make the further objection

that in no event could the trust estate be liable for penalties imposed because of the delinquency of the Trustee, and that it is not the duty of the trust estate to segregate the rightful part of this charge, if there be a rightful charge, from all that is wrongful.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court defendant's Exhibit No. 49, which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT No. 49.

Delinquent Taxes for 1916.

Noblesville Township.

Treasurer's Office.

No. 262.

Noblesville, Hamilton County, Ind., 6-16, 1917. $447.78.

Received of Fidelity Trust Co. the sum of Four Hundred Forty-seven Dollars and 78 Cents, In full for State, County, School, Special School Township, Gravel Road Construction and Road Tax, 708 delinquent for the year 191–, on Personal Property, Poll, and on the following described Real Estate:

Description of land.	Sec.	Town.	Range.	Acres.	Hund.
Pt. S. E.	12	18	4	59	60
Pt. N. S. W.	7	18	5	48	
W. S. W.	18	18	5	91	50
Pt. N. E.	13	18	4	65	

L. G. HEINY,
Treasurer of Hamilton County.

Fidelity Trust Company.

Authorized Capital Stock, $500,000.00.

148 East Market St.,

Indianapolis, June 15, 1917.

Mr. L. G. Henry,
Treasurer Hamilton County,
Noblesville, Indiana.

DEAR SIR:

We are herewith enclosing our Treasurer's check in the sum of $447.78 in payment of taxes on the two hundred seventy-five acre farm in Hamilton County.

We are also enclosing a stamped envelope for receipt.

Very respectfully yours,

FIDELITY TRUST CO.
J. ALBERT SMITH,
Vice-President & Trust Officer.

J. A. S.: F. M. C.

2 enclos.' "

709 Q. I hand you Exhibit No. 50, Mr. Fogarty, tell the court what that is?

A. Tax receipt issued by I. B. Austin, Treasurer of Hamilton County, for taxes paid by the Fidelity Trust Company of Indianapolis on Rooker lands in Hamilton County, April 11, 1918, in the sum of one hundred ninety-eight dollars and seventy-five cents.

The defendant, by counsel, now offers to introduce in evidence the receipt which has been marked by the reporter for identification as Defendant's Exhibit No. 50.

The plaintiffs, by counsel, ask the court for a reserved question of law on this, and we object to the introduction of the Exhibit in evidence, for the reason that, at the time this payment was made, the Fidelity Trust Company was claiming, and had of record the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, is made in aid of the Trust Company's wrong, and in violation of the trust agreement, and therefore is not a charge against the trust estate, and that, at the time this payment was made the title was a public record in the name of the Fidelity Trust Company under proceedings adverse to the trust estate.

710 The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court defendant's Exhibit No. 50, which Exhibit is in the words and figures following, to wit:

DEFENDANT'S EXHIBIT No. 50.

Receipt No. 268.

Noblesville Township.

Duplicate No. —.
Tax, $198.75; Road Tax, $—; Balance, $—.

Noblesville, Hamilton County,
Ind., 4-11, 1918.

Received of Fidelity Trust Co. the sum of One Hundred & Ninety Eight — 75/100 Dollars In Full for the first Installment of State, County, Township and Corporation Taxes for the Year 1917, on $—of [Personal Property, Poll],* and the following described Real Estate:

Description.	Sec.	Twp.	Range.	Acres.	Hds.	Net valuation.
P. S. E.	12	18	4	59	60	
P. W. S. W.	7	18	5	48		
W. N. W.	18	18	5	91	50	
P. N. W.	13	18	4	65		

I. B. AUSTIN,
Treasurer Hamilton County.

Original.

Q. I hand you Voucher No. 51, Mr. Fogarty, you may tell the Court what that is?

A. Receipted bill for insurance Fidelity Trust Company, August 10, 1917, in the sum of one hundred thirty-six dollars and fifty cents, paid.

Q. What insurance is it?

A. On the Rooker properties, and upon which the Indianapolis Life Insurance Company holds a mortgage, the Marion County Property.

Q. Do you know whether this is all on that or not; part of it on the Hamilton County land, is it not; the Globe and Rutgers is on the Marion County and the Caledonian is insurance on the Hamilton County land?

A. That may be; I presume it is, from the amount.

The defendant, by counsel, now offers to introduce in evidence the paper which has been marked by the reporter for identification as Defendant's Exhibit No. 51.

The plaintiffs, by counsel, object to this for the reason it is subsequent to the time when the Trustee abandoned this estate and surrendered its right as Trustee; and for the further reason this insur-

*[Words enclosed in brackets erased in copy.]

ance is void, there being previous insurance on the same property; and we ask the court for a reserved question of law as to this.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

712 The defendant, by counsel, then introduced in evidence and read to the court the Defendant's Exhibit No. 51, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 51.

"Fidelity Trust Co., Tr. (Rooker), in Account With Fidelity Trust Company.

Insurance, Fire, Liability, Plate Glass, Burglary, Accident, Employers', Automobile, Boiler and Tornado.

Real Estate, Loans, Rentals.

156-158 East Market Street.

Both Phones 73.
4% Paid on Savings Accounts.

Indianapolis, August 19, 1917.

8-18-17, Caledonian #2,821,619, Amt. $8,000.00, Prem.	$96.00
8-18-17, Globe & Rutgers #1,094,877, $2,700.00.....	40.50
	$136.50

Paid 9-7-17.

FIDELITY TRUST CO
C. K."

Q. Now, Mr. Fogarty, I will ask you whether all these
713 vouchers and receipts that you have just identified, and which have — introduced and read in evidence, whether they were paid in the performance of the trust involved in the deeds and in the instrument of trust executed by the Rookers on the one part, and the Trust Company on the other part, and whether they were for and represented payments of money made by the Fidelity Trust Company in its capacity as Trustee in this suit?

The plaintiffs, by counsel, object to this question, your Honor, for two reasons; first, because he has been interrogated subsequently as to each of these, the purpose, manner and authority for payment, as the Exhibits were introduced; and second, this calls upon this witness to perform your Honor's duty of deciding this case.

The court sustained the objection of the plaintiffs, to which ruling of the Court the defendant, by counsel, then and there took an exception.

Court adjourned until one o'clock P. M.

W. M. FOGARTY, witness, recalled for further direct examination.

Questions by Mr. Henry Seyfried:

714 Q. Mr. Fogarty, you may tell the court whether any of the amounts of money paid out, as shown by the vouchers which have been identified by you and introduced here, have ever been repaid to the Fidelity Trust Company by the plaintiffs in this case?

A. No, sir, they have not.

Q. And they are still unpaid at this time, and with interest.

A. Yes, sir.

Q. You may state whether or not the Fidelity Trust Company as Trustee in this estate, Trustee on this estate, had any funds which belonged to the trust?

The plaintiffs, by counsel, object to that, your Honor, for the reason that the trust relationship is defined by written instruments which describe the assets of the estate, and that this written instrument can not be varied by parol evidence.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

A. It had none.

Q. And you may tell where the Fidelity Trust Company as Trustee, obtained the funds which were advanced by it?

A From the Fidelity Trust Company in its corporate capacity proper.

Q. That is the Fidelity Trust Company?

715 A. The Trust Company, a corporation under the laws of the State of Indiana.

Q. With capital and assets consisting of deposits of depositors?

A. Yes.

Q. And capital stock paid in?

A. Yes.

Q. And these moneys that you paid out came from that source?

A. Yes, sir.

Q. You may tell the court whether any of the lands conveyed to the Fidelity Trust Company in trust, have ever been sold by the Trustee?

A. They have not.

Q. And you still hold them?

A. Yes.

Q. Did you ever make any efforts to sell any part of the lands; if so which part?

A. Yes, sir, the Marion County lands.

Q. And were you able to find a purchaser at the price that was nominated in the instrument?

A. No, sir.

Q. You identified an advertisement yesterday which the plaintiff

introduced in evidence, appearing in the Indianapolis Star, and stated that that was inserted by your Company?

A. Yes, sir.

Q. I will hand you, now, Defendant's Exhibit No. 52, and you may tell the court what that paper is?

A. This is a notice addressed to William V. Rooker and Dora E. Rooker, dated June 21, 1917, signed by Fidelity Trust Com-
716 pany, by William M. Fogarty, President, and attested by its secretary, and corporate seal thereon, giving notice that, pursuant to certain deeds of conveyance, that the Marion County lands in the Rooker trust would be offered for sale.

Q. For sale?

A. Yes.

The defendant, by counsel, now offers to introduce in evidence the letter which has been marked by the reporter for identification as Defendant's Exhibit No. 52.

The plaintiffs, by counsel, object to that, your Honor, for the reason it is a self-serving declaration made by the Trust Company after these proceedings in the Supreme Court, and when the functions of the Trust Company as Trustee were at an end, and after it had elected to declare upon the instrument as a mortgage and not a trust deed, that it is estopped by its own conduct and by the judicial record in this case from the right further to assert, on its behalf, the rights of the Trustee.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the Court the defendant's Exhibit No. 52, which Exhibit
717 is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 52.

"Fidelity Trust Company.

Authorized Capital Stock $500,000.00.

148 East Market St., Indianapolis.

To William V. Rooker and Dora E. Rooker:

Pursuant to the provisions of the deed of conveyance executed to the undersigned as Trustee, on the 11th day of October, 1909, conveying to the undersigned as Trustee, the following described real estate in Marion County State of Indiana, to-wit:

The South East quarter of the North East quarter of Section 33, Township 17 North, Range 4 East, containing 10 acres, more or less; also the South West quarter of the North West quarter of section 31, Township 17 North, Range 4 East, containing 10 acres more or less, and the Memorandum executed concurrently therewith, notice is hereby given that the Fidelity Trust Company as Trustee

will, ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable, and upon the consummation of a sale, the undersigned as such Trustee will execute to the purchaser a proper Trustee's deed conveying the title thereto in fee simple to the purchaser.

718 Dated at Indianapolis, Indiana, this 21st day of June, 1917.

FIDELITY TRUST COMPANY,
Trustee.

By WILLIAM M. FOGARTY,
President.

Attest:

[Seal Fidelity Trust Company, Indianapolis, Ind.]

JAMES G. FLAHERTY,
Secretary."

719 Q. Now, I had called your attention, in a previous question, to the advertisement that appeared in the Star; I will ask you whether or not a notice was also—notice of the same character and same thing, was inserted in any other newspapers?

A. I think there was; we don't have it in our office, but I am pretty sure there was.

Q. For the purpose of refreshing your recollection, I hand you this memoranda, and state whether or not you can, from that, refresh your recollection?

A. Yes, it that was Indianapolis News advertisement, the same thing.

Q. Now you may tell the Court on what dates that notice, which appeared in the Star and News, was published?

A. The Indianapolis Star January 16, 23 and 30, and February 6, 1918.

Q. Now you may state whether, pursuant to that notice, you are able to make a sale of the Marion County land?

The plaintiffs, by counsel, object to that question, your Honor, for the reason that, at the time of this attempt, it was a matter of public record, record made upon the initiation and under the direction of the defendant, Trustee; that the defendant trustee was not, in fact, a trustee, but was only a mortgagee, and that it had resigned and elected to take an attitude hostile to the trusteeship, and that having elected to take that position, it waived its right to
720 proceed under the trust agreement, and of said election waiver all persons had notice, the same being a judicial record, and having such notice, purchasers were advised that a purchase of the land would be perilous, and therefore no purchasers were attracted to the notice.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

A. No, sir.

Q. Now, Mr. Fogarty, it is a fact, is it not, that Mr. and Mrs. Rooker have been in possession of these lands all the time during the continuance of this trust?

A. The whole time, yes, sir.

Q. You may state whether or not they ever turned in to you any of the proceeds of the lands?

The plaintiffs, by counsel, object to that question, your Honor, our duty was to the trust estate, and if we turned in these lands and the proceeds of these lands for the benefit of the trust estate, that was sufficient, used on the betterment of it; we didn't have to pay the Fidelity Trust Company.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

721 A. No payments ever made to us by them.

Q. Did Mr. or Mrs. Rooker ever call on you to ask you to either lease or join in leasing any of the lands?

The Plaintiffs, by counsel, object to the question for the reason that calls upon a duty that is outside the trust agreement; the trust agreement stipulated the relation of the parties and the performance of their duties in respect to this trust estate.

The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there took an exception.

Q. Now, Mr. Fogarty, did you ever have any talks, or Mr. Rooker have any talks with you, or in your presence, regarding paying off the moneys that you had advanced in this estate?

A. Yes, several times, in the early part of the trust, early year or year of it.

Q. What did he say as to that?

The plaintiffs, by counsel, object to the question, your Honor, for the reason that it is not in issue in this case, there is no suit here on any parol promise, and further, that a parol promise to pay the debt of the trust estate would be a parol promise to pay the debt of another person, which should be in writing.

The court overruled the objection of the plaintiff, to which
722 ruling of the court, the plaintiffs, by counsel, then and there took an exception.

A. I don't remember the exact words, but he said to me several times in the early part of the trust, that he was soon going to be able to make payments, and instead of his owing us money, that he would have money in our bank there on deposit.

Q. And you may state whether or not, from those conversations you were led to believe, by him, that he was claiming the right to re-conveyance of these lands?

The plaintiffs, by counsel, object to the question for the reason it is calling for a conclusion.

The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there took an exception.

Q. You may state whether or not you ever had any talk with him, with Mr. Rooker or his wife, in which there was promises made that the proceeds of the crop on these lands would be paid in to the Trustee as a credit upon the debt that was accumulating?

The plaintiffs, by counsel, object to that, your Honor, for the reason the relationship of the parties in respect to this trust property is confined to the contract; that there is no allegation in any of the pleadings in this cause that that trust contract was modified by any subsequent agreement, such as that the rents or profits should be paid over; no issue of that kind in the case, and the question is entirely irrelevant and immaterial to anything that the plaintiffs in this case had notice of.

The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there took an exception.

(By Mr. Seyfried:) We simply wanted to offer it for the one purpose, and that was to show that the plaintiff had led the Trustee to believe that he was claiming the right to pay off this indebtedness, and in which he was led to believe that he also claimed the right to redeem his lands from the trust obligation and entitled him to a reconveyance, that is the only purpose we wanted to offer it for.

(By the Court:) The offer is refused and the objection is sustained.

Q. Mr. Fogarty, were there any orders ever presented to your company, signed or brought there or sent there by Mrs. Dora E. Rooker, which your Company dishonored and refused to pay?

A. I don't recall.

Q. You don't remember any?

A. No.

Q. Do you remember the controversy about the Balke and Krauss account?

A. Yes.

Q. You may state—you did pay a large voucher issued by Mrs. Rooker for over two thousand dollars to them, didn't you.

A. Yes.

Q. And was there any other voucher afterwards drawn by her that was presented to you?

A. I think there was, but I don't recall just what it was.

Q. And do you know what circumstance attended the second voucher, or what controversy attended it?

A. The Balke and Krauss?

Q. Yes?

A. I don't just recall it.

Q. But was there some controversy about it?

A. I think there was.

Q. Was there some controversy between Mr. Rooker and Balke and Krauss at the time, or shortly after they had issued it?

A. Yes.

Q. During that controversy you didn't pay the voucher?

A. No, sir.

Q. And was it ever afterwards presented to you?

A. I think it was, at the time the judgment was paid, or something of that sort.

Q. Or later was not the check given in place of the voucher?

A. Check, yes, I think so.

Q. Now, outside of the circumstance in which some controversy arose, was there ever a voucher or order drawn against your Company by Mrs. Rooker which your Company did not pay?

725 A. I think there was never any.

Q. Did Mr. Rooker or Mrs. Rooker ever talk to you about wanting you to make further advancements without presenting an order for it?

A. Mr. Rooker talked to me about various other forms of improvements that he was discussing putting in to the property.

Q. What did he want to put in; what did he tell you he wanted to put in?

A. Well, he talked about putting in a plunge bath in the cellar of the house.

Q. He wanted you to agree to furnish the money for it?

A. Well, he was talking in that way, and I remember we were rather troubled about the advancements; I took it to you at once regarding that conversation.

Q. You didn't encourage him to do that?

A. No, I didn't.

Q. Do you remember any other talk he had with you where he wanted further advancements?

A. Not specifically, no.

Q. Did he talk to you about wanting to go to Chicago and buy lean steers and feed them?

A. Yes, he did.

Q. What did he tell you on that occasion, if you remember?

The plaintiffs, by counsel, object to the question, your Honor, for the reason nobody seems to have acted on it.

The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel, then and there

726 took an exception.

Q. But in those cases you discouraged him of creating the indebtedness?

A. Yes.

Q. Did he ever come to you during the years that he says the Marion County farm was idle, and ask you to in any way assist in financing the cultivation of the Marion County lands during those years?

The plaintiffs, by counsel, object to the question for the reason it is irrelevant and immaterial.

The court overruled the objection of the plaintiffs, to which rul-

ing of the court the plaintiffs, by counsel, then and there took an exception.

A. Not to my knowledge.

Q. Well, you would know if he came and talked to you about that matter?

The plaintiffs, by counsel, object to the question for the reason it is argumentative.

The court sustained the objection of the plaintiffs, and the defendant, by counsel, withdrew the question.

Q. Did he ever come to you about any repairs that were necessary, such as improving fencing?

A. No, I think not.

Q. When was the last time Mr. Rooker was in your office if you can remember?

A. I could not say that; it has been a long while ago.

727 Q. You were in the Marion County Circuit Court at the time of the trial as to the title of the Marion County lands?

A. Yes.

Q. You may state whether or not Mr. Rooker, in open court there, claimed, on behalf of himself and his wife, the plaintiffs in that action, to be the owners of that property, and asked and insisted upon the Court quieting the title in them?

The plaintiffs, by counsel, object to that, your Honor, for the reason the records of the Marion County Court are the best evidence of their own contents.

(By the Court:) I take it they can testify whether or not they got a title to this real estate; that is not a question of record proof.

The plaintiffs, by counsel, object further because it calls upon the witness to interpret a meaning upon the pleadings in that case.

Q. No, I am asking for what Mr. Rooker claimed in open court, by his word of mouth?

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

A. I don't remember his exact words.

Q. Can you give in substance what he was contending in open court, before the Judge trying the case?

A. Yes, sir, I think so.

728 Q. And what was that, Mr. Fogarty?

A. That the title should be quieted by that proceeding in himself and his wife, Dora E. Rooker.

The plaintiffs, by counsel, moved the court to strike from the record the answer for the reason it is not responsive and for the reason it is a conclusion drawn by the witness.

(By the Court:) The motion is coming too late. The court then overruled the motion of the plaintiffs to strike out, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

Cross-examination.

Questions by Mr. W. V. Rooker:

Q. Mr. Fogarty, this case that you testified about as having been tried in the Marion Circuit Court, went to final judgment and has been appealed to the Supreme Court, has it not?

A. I think so.

Q. Now you said that I came in to your office on one occasion to talk to you about soon being able to make payments and being in a situation where, instead of owing you, I would have money in your bank; do you remember when that was?

A. Well, that was about 1910, I think.

Q. Soon after the trusteeship was made?

729 A. Not a great while after; may be it might have been a year.

Q. And do you know what brought about that conversation?

A. No, I don't recall just now.

Q. Talking about some books, were we not?

A. Yes, I believe we were.

Q. And do you remember anything that occurred on that occasion, any act that was done?

A. I think you read a considerable portion of the book called "Weather Beaten Man" that you had written to me.

Q. The "Weather Beaten Man" was not printed at that time, was it?

A. No, I think not; I think you read it from manuscript.

Q. It was printed the next year, was it not?

A. I don't know.

Q. Now, Mr. Fogarty, I will ask you to look at this for the purpose of fixing the date, and refreshing your recollection. I will ask you to look at this memoranda endorsed on the fly leaf of the book entitled, "Giggle Time and Others," by William M. Fogarty, and tell the court if you wrote that memoranda?

A. Yes.

Q. And at that time presented your compliments to me in the form of the book?

A. Yes.

Q. And told me about your experience in publishing it?

A. Yes.

Q. And I asked you how to go about publishing a book, and you related to me, among other things, you needed publicity, and

730 you didn't care whether the publicity was good or bad, so it was publicity?

A. That I did.

Q. Just wanted them to say something about the book, even if it was against the book?

A. O, yes, about the book.

Q. And we had a pleasant conversation there, expressing the experience and past of literary men?

A. Yes.

Q. And in that time I told you I hoped my book would be a success, so I might be able to pay everybody and have money in the bank.

A. Yes.

Q. That was that conversation?

A. Part of it.

Q. Well, it was on that topic, and that was the time I told you that I hoped to get money out of my book and pay everybody everything I owed and have money in your bank?

A. Yes, sir.

Q. April 29, 1910, that was the date of it. "To my Friend, W. V. Rooker: With the Best of Wishes: April 29, 1910." Now you have testified in answer to Mr. Seyfried, that you borrowed the money on behalf of this estate, from the Fidelity Trust Company in its corporate capacity proper?

A. No, sir.

Q. Where did you get the money?

A. The Fidelity Trust Company in its corporate capacity as I understand the law, under acts as provided by the laws of Indiana, is trustee, executor, administrator, etc, without changing its 731 exact entity, it is always Fidelity Trust Company; it was as Fidelity Trust Company, Trustee, that we advanced this money in this trust, charging ourselves as Trustee with the debit items.

Q. You mean the Fidelity Trust Company had power, under the law, to make—to enter into trust contracts——

(By the Court:) We are not going to enter into any legal question here.

and the advancements you made were made under the written instruments?

A. Yes.

Q. And not under your general power of law?

The defendant, by counsel, objects to the question.

(By the Court:) Mr. Fogarty is not supposed to be a lawyer. The Court then sustained the objection of the defendant, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

Q. You are a member of the bar of the Marion Circuit Court, are you not?

A. Yes.

Q. Now, in reference to the Balke and Krauss judgment, you are acquainted with Mr. Schulz, the manager of the Balke and Krauss Company?

A. Yes.

Q. Do you remember the circumstance of him coming to you with an order from Mrs. Rooker for the payment of some money?

732 A. Yes.

Q. And you didn't pay that order?

A. That, now, I don't remember exactly, it has been so long ago.

Q. Now, refresh your recollection, Mr. Fogarty, didn't you tell Mr. Schulz that you would have to have an affidavit from Mrs. Rooker as to the accuracy of that claim, and didn't she send you an affidavit in pursuance of that request?

A. Well, there were some disputes about it some way. I don't recollect the details just now.

Q. And then, after you got that affidavit, didn't you insist that Mr. Schulz—that you should have an affidavit from myself as to the details?

A. I don't remember that.

Q. And after you got the two affidavits, didn't you tell Mr. Schulz he would have to file a lien upon his claim and transfer that lien to you?

A. I don't remember those details, Mr. Rooker, about it.

Q. And didn't you, after the lien was filed, direct him that he must foreclose the lien?

A. I don't remember that.

Q. And he did foreclose that lien?

(By the Court.) Mr. Rooker, he says he does not remember that.

Q. Well, he did foreclose that lien, and you bought the judgment on that lien?

A. I think he foreclosed the lien and it was assigned to us, yes.

Q. Do you remember the original amount of the Balke and

733 Krauss lien, before the attorney's fees and costs were added?

A. No, I don't offhand.

Q. Now, you were asked also about a voucher you paid, four hundred dollars, to Mr. Keyser, your Exhibit No. 3; was that payment made when the order was presented?

A. My recollection of it, it was, yes.

Q. I will ask you if you remember of Gavin and Gavin, Attorneys in Indianapolis, calling on you in respect to the Keyser claim?

A. Yes.

Q. And you had quite a protracted controversy with Keyser about that contract?

A. Yes, there was some details regarding that, and its payment. I don't recall just what they were.

Q. And you required Mr. Keyser to cancel the contract and do nothing further under it, and to assign to you the lien for the amount you paid?

A. I don't remember what was done exactly; I remember the voucher for four hundred was paid.

Q. And nothing ever was paid to Keyser further than that?

A. I don't think so.

Q. And you knew at that time that the Keyser contract was not complete?

A. I don't recall whether we did or not.

Q. In respect to these insurance policies that have been issued since 1913, have you those policies in court?

A. Those that were on the Marion County farms I don't think we have; they would be held properly by the Indianapolis Life Insurance Company.

734 Q. Well, those policies were made with the loss, if any, payable to the Fidelity Trust Company, and without a mortgage or other lien clause attached, were they not?

A. I don't know, I would have to see the policies.

Q. Have you those here?

A. We have, other than those that the Indianapolis Insurance Company may have.

Q. Can you tell, without reference to them, whether they were made to you?

A. I think they were written in the name of the Fidelity Trust Company, Trustee.

Q. Now, in respect to this American Central mortgage; your Company brought suit to foreclose that against this estate, did you not?

A. We have so many pleadings filed in these cases of litigation, I don't remember just what that action was, Mr. Rooker.

Q. I will ask you to look at this memoranda which I will have the reporter mark for identification as Plaintiffs' Exhibit No. 5, and tell the court if it is the complaint your company filed to foreclose that mortgage?

A. Yes, sir.

Q. The date is blurred?

A. May 15.

Q. Nineteen fourteen?

A. I can't tell.

Q. Now, prior to the filing of this complaint in Cause No. 16755, you had also intervened in the suit of Dora E. Rooker against the American Central Life Insurance Company?

735 A. Our General Counsel handled all that matter. I don't know that I could answer yes or no on that; there was a lot of suits always coming on in this case.

The plaintiffs, by counsel, now ask to introduce and read in evidence, your Honor, the complaint in cause No. 16755, Hamilton Circuit Court, wherein Fidelity Trust Company, of Indianapolis, Indiana, is plaintiff, and Dora E. Rooker and William V. Rooker and the American Central Life Insurance Company, of Indianapolis, are defendants, the same being marked by the reporter for identification as Plaintiffs' Exhibit No. 5.

The plaintiffs, by counsel, then introduced in evidence and read to the court Plaintiffs' Exhibit No. 5, which Exhibit is in the words and figures following, to-wit:

PLAINTIFFS' EXHIBIT No. 5.

"STATE OF INDIANA,
County of Hamilton, ss:

In the Hamilton Circuit Court.

FIDELITY TRUST COMPANY OF INDIANAPOLIS, INDIANA,

vs.

DORA E. ROOKER, WILLIAM V. ROOKER, AMERICAN CEN-
736 TRAL LIFE INSURANCE COMPANY OF INDIANAPOLIS, INDIANA.

Complaint to Foreclose Mortgage.

The Fidelity Trust Company of Indianapolis, Indiana complains of the defendants Dora E. Rooker, William V. Rooker and American Central Life Insurance Company of Indianapolis, Indiana, the last named defendant being a corporation incorporated under and doing business under the laws of the State of Indiana, and for its cause of action says that it, the plaintiff, is a corporation organized under the laws of the State of Indiana, and that heretofore, namely, on the 19th day of November, 1908, the defendant Dora E. Rooker by one promissory principal note, a copy of which is filed herewith, made part hereof and marked exhibit "A", promised to pay to the American Central Life Insurance Company of Indianapolis, Indiana, five (5) years after said date of November 19, 1908, the sum of Fourteen Thousand ($14,000.00) Dollars with interest at the rate of six per cent per annum from date until maturity, payable semi-annually, which semi annual interest is evidenced by coupon interest notes of the same date and with 8 per cent interest per annum after maturity until paid and 10 per cent attorney's fees.

That on the same 19th day of November, 1908, the defendant Dora E. Rooker by her promissory interest note or coupon, a copy of which is filed herewith, made part hereof and marked exhibit "B", promised to pay to the American Central Life Insurance of Indianapolis, Indiana on November 19, 1913, the sum of
737 Four Hundred and Twenty ($420.00) Dollars, with interest at the rate of 8% per annum after maturity until paid and 10% attorney's fees.

That at the same time namely, on said 19th day of November, 1908, the defendants Dora E. Rooker and William V. Rooker who was then and is now her husband, executed to the American Central Life Insurance Company of Indianapolis, Indiana, a mortgage, a copy of which is herewith filed, made part hereof and marked exhibit "C" to secure the payment of said notes, which mortgage aforesaid was executed and given upon the following described real estate situate in the County of Hamilton and State of Indiana, to-wit:

All that part of the southeast quarter of section twelve (12) township eighteen (18) north, range four (4) east lying east of White River, also all that part of the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east lying west of the Lake Erie and Western Railroad and east of White River more particularly described as follows:

Beginning at the southwest corner of said quarter section; run thence east along and upon the south line of said section to the middle of the Lake Erie and Western Railroad, as now located, thence following the Middle of said Railroad to its intersection with the north line of the southwest quarter of section seven (7) at a point sixty (60) rods north of the mouth of Stony Creek and sixty rods north of the center of the Railroad bridge crossing said stream; thence west to the northwest corner of said southwest quarter; thence following the course of White River in a southerly direc-
538 tion to the range line separating ranges four (4) and five (5), thence south upon said range line to the place of beginning including all sand and gravel deposits at the mouth of Stony Creek; also all of the west half of the north half of section eighteen (18) township eighteen (18) north, range five (5) east lying west of the Lake Erie and Western Railroad; also the following described part of the northeast quarter of section thirteen (13) township eighteen (18) north range four (4) east beginning at the northeast corner thereof, run thence west with the section line one hundred and thirty two (132) rods to the east bank of White River, thence southwesterly along the east bank of White River with the meanderings of said stream to a point thirty nine and ninety five hundredths 39-95 100 rods south of the north line of said section; thence east sixty-five and eighty hundredths (65-80 100) rods; thence south seventy three and fifteen hundredths rods, thence east sixty eight and twenty five hundredths (68-25 100) rods; thence north 115-62 100 rods to the place of beginning.

which mortgage was duly filed for record in the Recorder's office of Hamilton County, Indiana on the 19th day of November, 1908 and recorded in Mortgage Record 52 pages 84 and 85.

That on the 21st day of November, 1913 the defendant American Central Life Insurance Company of Indianapolis, Indiana for full value received, sold, transferred and assigned said notes hereinbefore described and set forth to the plaintiff herein and on the same
539 day and as part of the same transaction sold, transferred and assigned said mortgage hereinbefore described to the plaintiff Fidelity Trust Company, and said plaintiff Fidelity Trust Company is now the sole owner of said notes and mortgage.

That said assignment of said mortgage was duly recorded in the Mortgage Records of the Recorder's Office of Hamilton County, Indiana.

That said notes are now due and wholly unpaid; that in said notes the defendant promised to pay attorney's fees as and for the plaintiff's attorneys and a reasonable fee herein is Fifteen Hundred ($1,500) Dollars.

Wherefore plaintiff prays judgment against the defendant Dora E. Rooker for Fifteen Thousand ($15,000.00) Dollars, together with Fifteen Hundred ($1,500.00) Dollars attorney's fees, the foreclosure of said mortgage, and that said real estate or so much thereof as may be necessary be sold to satisfy the plaintiff's claim and the costs herein laid out and expended, and for any and all other proper relief.

HENRY SEYFRIED,
KANE AND KANE,
Attorneys for Plaintiff, Fidelity Trust Company.

EXHIBIT "A."

First Mortgage Real Estate Note to American Central Life Insurance Company of Indianapolis, Indiana.

Number 395.
14,000 Dollars.

Indianapolis, Indiana, November 19, 1908.

Five years after date I promise to pay to the order of
740 American Central Life Insurance Company of Indianapolis Indiana, Fourteen Thousand and 00 100 Dollars. Negotiable and payable at the Indiana National Bank of Indianapolis Indiana with interest at the rate of six per cent per annum from date until maturity, payable semi-annually which is evidenced by coupon interest notes hereto attached and with interest at the rate of eight per cent per annum after maturity until paid, and ten per cent attorney fees. Value received without any relief whatever from valuation or appraisement laws of State of Indiana. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this note.

DORA E. ROOKER

Privilege is granted of paying One Hundred Dollars ($100.00) or any multiple thereof on any interest pay day after one year.

On back: Nov. 21, 1913. Assigned without recourse to Fidelity Trust Company of Indianapolis. No. 395. American Central Life Insurance Company, by Frank M. Morrison Third Vice President. First mortgage real estate note and interest coupons. $14,000.00. Due Nov. 19, 1913. Interest and principal payable at The Indiana National Bank Indianapolis, Indiana. Interest 6 per cent payable May and November.

EXHIBIT "B."

741 Indianapolis, Indiana, Nov. 19, 1908.

November 19, 1913 I promise to pay to American Central Life Insurance Company, Indianapolis, Indiana, Four Hundred Twenty

and 00/100 Dollars payable at The Indiana National Bank of Indianapolis, Indiana, value received, without any relief whatever from valuation or appraisement laws of State of Indiana, with interest at the rate of eight per cent per annum after maturity until paid and ten per cent attorney's fees. The drawers and endorsers severally waive presentment for payment protest and notice of protest and notice of non payment of this note.

DORA E. ROOKER.

Endorsed on back as follows: Nov. 21, 1913 assigned without recourse to Fidelity Trust Company of Indianapolis. American Central Life Insurance Company, by Frank M. Morrison, Third Vice President.

EXHIBIT "C."

This indenture witnesseth That Dora E. Rooker and William V. Rooker, her husband of Hamilton County in the State of Indiana, mortgage and warrant to American Central Life Insurance Company of Indianapolis, Indiana, the following described real estate in Hamilton County in the State of Indiana, to-wit:

All that part of the southeast quarter of section twelve (12) township eighteen (18) north range four (4) east lying east of White River. Also that part of the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east lying west
712 of the Lake Erie and Western Railroad and east of White River, more particularly described as follows:

Beginning at the southwest corner of said quarter section; runthence east along and upon the south line of said section to the middle of the Lake Erie and Western Railroad, as now located; thence following the Middle of said Railroad to its intersection with the north line of the southwest quarter of section seven (7) at a point sixty (60) rods north of the mouth of Stony Creek and sixty rods north of the center of the Railroad bridge crossing said stream; thence west to the northwest corner of the said southwest quarter; thence following the course of White River in a southerly direction to the range line separating ranges four (4) and five (5); thence south upon said range line to the place of beginning, including all sand and gravel deposits at the mouth of Stony Creek; also all of the west half of the north half of section eighteen (18) township eighteen (18) north range five (5) east lying west of the Lake Erie and Western Railroad. Also the following described part of the northeast quarter of section thirteen (13) township eighteen (18) north range four (4) east beginning at the northeast corner thereof, thence run- west with the section line one hundred thirty two (132) rods to the east bank of White River, thence southwesterly along the east bank of White River with the meanderings of said stream to a point thirty nine and ninety five hundredths (39-95 100) rods south of the north line of said section; thence east sixty five and eighty hundredths (65-80/100) rods; thence south seventy
713 three and fifteen hundredths rods; thence east sixty eight and twenty five hundredths (68 25 100) rods; thence north

115-62/100 rods to the place of beginning,—and all rights and appurtenances thereto belonging, the rents, issues and profits of said real estate to secure the payment when the same shall respectively become due, of one principal note of Fourteen Thousand ($14,000.00) Dollars payable November 19th, 1913 and ten (10) coupon or interest notes of Four Hundred Twenty and 00/100 ($420.00) Dollars each payable in six, twelve, eighteen, twenty four, thirty, thirty six, forty two, forty eight, fifty four and sixty months, respectively, after date. All of said notes are dated November 19th, 1908, bear interest at the rate of eight per cent/um per annum after maturity, and are payable at the Indiana National Bank, Indianapolis, Indiana, with ten per cent attorneys' fees without any relief from valuation or appraisement laws. All of said notes are executed by Dora E. Rooker and are payable to the said mortgagee. Privilege is granted of paying One Hundred Dollars ($100.00) or any multiple thereof on account of said principle note on any interest pay day after one year.

The said mortgagors agree that upon failure to pay any or either of said principal, coupon or interest notes at maturity, or to pay insurance, taxes or assessments as hereinafter provided or on failure to comply with each or any of the terms and conditions of this instrument, then all of the debt secured hereby shall become due and collectible at the option of the mortgagee; and it is expressly agreed
that upon any such default said company shall be entitled
744 to enter upon and take possession of said mortgaged premises as mortgagee and to collect the rents and profits thereof and apply the same on the debt hereby secured, or at its election, it shall thereupon be entitled as of right to have a receiver appointed to collect the rents, issues and profits arising from said mortgaged premises. The omission of said mortgagee to exercise said option upon any default as aforesaid, shall not preclude it from the exercise thereof upon any subsequent default. Notice of the exercise of said option inregard to any of the matters herein provided for is not required to be given by said mortgagee, said mortgagors hereby waiving any such notice. Said mortgagors hereby agree to keep all legal taxes, charges and assessments on said premises paid, and keep fire, cyclone and lightning insurance on the buildings on said premises to the amount of $2,000.00 of each kind of said insurance in a reliable insurance company or companies, to the approval of said mortgagee and for its benefit (as its mortgage interest may appear) such interest to be evidenced by a standard mortgagee clause, and to deliver all policies of insurance and renewals thereof on said buildings, to said mortgagee, to be held until said mortgage debt is fully paid and in case of failure by the mortgagors to pay such taxes, charges or assessments, or to procure such insurance, the said mortgagee may, at its election, pay such taxes, charges and assessments and effect such insurance, and any and all sums of money so paid, with interest at the rate of eight per cent per annum from date of
payment shall be and they are hereby made part of the
745 mortgage debt hereby secured.

It is further agreed generally that said mortgagee may, at its election advance and pay any sum of money that in its judgment may be necessary to perfect the title of said mortgaged premises in said mortgagors or to maintain such title or to preserve the security intended to be given by this mortgage, and any and all sums of money so advanced and paid, with interest at the rate of eight per cent per annum shall be and they are hereby made a part of the mortgage debt hereby secured. The mortgagors agree to furnish to the mortgagee at each interest pay day evidence of the payment of all past due taxes and assessments.

The said mortgagors hereby expressly agree to pay all and singular the sums of money secured by this mortgage, without relief from valuation and appraisement laws of the State of Indiana and with ten per cent attorneys' fees. The mortgagors also agree that they will take proper care of said real estate and buildings thereof and neither waste nor allow waste to be committed and will neither do nor suffer anything to be done that will impair the value thereof or of the security hereby given, and that the agreements of the mortgagors hereinbefore recited and the representations below made are made also for the benefit of any assignee of this mortgage and the debt aforesaid or of any part thereof. And the mortgagors represent to the mortgagee that the title to said real estate is a good and indefeasible estate of inheritance in fee simple in the mortgagor Dora E. Rooker.

And it is further stipulated that the mortgagee may at
716 its option, be entitled to be subrogated to any lien or other claim paid by or with the moneys advanced and hereby secured.

In witness whereof the mortgagors have hereunto set their hands and seals this nineteenth day of November, 1908.

DORA E. ROOKER.
WILLIAM V. ROOKER.

STATE OF INDIANA,
Hamilton County, ss:

Before me, the undersigned a Notary Public in and for said County this nineteenth day of November, 1908 personally appeared Dora E. Rooker and William V. Rooker her husband and severally acknowledged the execution of the annexed mortgage to be their voluntary act and deed.

Witness my hand and notarial seal the day and year last written.
[SEAL.] F. M. BAKER,
Notary Public.

My Com. expires 5/14/09.

(On back of mortgage:) Received for record the 19th day of Nov. A. D. 1908 4 o'clock P. M. and recorded in mortgage record 52 page 445. '16755. Hamilton Circuit Court. Fidelity Trust Company, Indianapolis, Indiana, vs. Dora E. Rooker et al. Complaint to

foreclose mortgage. The plaintiff directs the Clerk to is-
747 sue summons to Sheriff of Hamilton Co. to the defendants Rooker and Rooker returnable May 26", 1914. Seyfried, Kane & Kane, Attys. Henry Seyfried, Attorney for Fidelity Trust Company. Filed May 15, 1914. W. F. Wall, Clerk of Hamilton County.'"

The plaintiffs, by counsel, ask in this connection, your Honor, where the file mark is blurred, to read in evidence so much of the entry docket as shows the date of filing, that it is May 14, 1914.

(By the Court:) All right.

Q. Mr. Fogarty, since this judgment of the Supreme Court was rendered, what, if anything, have you done toward a reconveyance of the property to the Trustee, or anything like that; these deeds that you have taken, any steps at all in that particular?

A. Reconveyance by the Trust Company as Trustee?

Q. No, reconveyance by the Trust Company to the Trustee or to any other person to clean the record of these sheriff's deeds you got?

A. No, there has been no conveyance.

Redirect examination.

Questions by Mr. Henry Seyfried:

748 Q. I will ask you whether or not the matter about affidavits, etc., regarding the Balke and Krauss were not attached to this voucher that was drawn on you for two thousand five hundred and some odd dollars?

A. Yes.

Q. And at the time you paid this you had already previously paid Balke and Krauss one thousand dollars, had you not?

A. I think we had, yes.

Q. Did you at any time stop Keyser from finishing any work up there that he and Rooker were carrying on?

A. No, sir.

Q. Did you ever tell him not to do it?

A. No, sir.

Q. Mr. Fogarty, do you remember the different law suits that were filed against Mr. Rooker arising out of the furnishing of material for the construction of the house on the Hamilton County Lands?

A. Well I remember several.

Q. Which ones can you remember?

A. The Balke and Krauss; there is the Ludowici-Celadon Company; I think the Daniel I. Neher, and I don't remember the exact cause of the suit of the Citizens Bank here, but they had legal complications to settle that were settled and finally by us paid.

Q. That was those notes?

A. Yes.

Q. How about the Hatfield Company?

A. I think a suit with the Hatfield Electric Company

Q. And you had no attorney up here at Noblesville, did you?

A. No, sir.

Q. And you had Kane and Kane looking after some matters in nection with the Company, did you?

A. Yes, later.

Q. And as these matters were brought up from time to time you fit to have your abstract of title brought down to date?

A. Yes, sir.

(By the Court:) Gentlemen, those abstracts are in the record and explained.

Q. Now, when you paid the Ludowici judgment, that was after Supreme Court had—the Appellate Court had affirmed the judgnt?

A. Yes.

Q. And when you paid the Balke and Krauss judgment, it was er the case had been litigated and the judgment entered by the urt in this county?

A. Yes.

Q. And it had not been appealed from?

A. No, sir.

Q. Can you tell the court what amounts of these taxes that have n paid, which appear to have been paid after having gone deqnent, amount to penalty?

The plaintiffs, by counsel, object to that for the reason the statute s that, there is a mere matter of compensation.

The court sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel then and there took an exception.

(By Mr. Seyfried:) What we want to do is this, your Honor, if re be any question, we want to offer a remitter to the amount of penalties; we are not able to figure them out; certainly the statute s them, and I in my own way have estimated them.

(By the Court:) That is up to you, whether you offer a remitter, whether you claim it.

(By Mr. C. S. Cox:) We want the record to show we are not claimg any reimbursements for the amount of the penalty on the dequency.

(By Mr. Seyfried:) And if you know how much they amount to, ill, we can agree on it.

(By Mr. Rooker:) No, I don't; we can ascertain them. I have not mputed it.

The plaintiffs, by counsel, withdraw the objection to all the tax yments made by them prior to the time of the repudiation of this st contract, on their statement that they will remit all the penals.

Recross-examination.

Questions by Mr. W. V. Rooker:

751 Q. Mr. Fogarty, you have been asked on redirect examination about some litigation; now you don't know anything about the issues, do you, as a matter of memory, in the Balke and Krauss case?

A. I don't recall them just now, no.

Q. Could you tell the Court whether or not, in that case, my wife and I were opposing the litigation at all, and contending that the vouchers should be paid?

A. I don't remember it well enough, Mr. Rooker, to try to tell.

Q. Now, in the Ludowici-Celadon matter a suit had been brought for a large sum, and was defended by my wife and me, and the amount sued on was largely reduced, was it not?

A. I believe it was.

Q. And in the Neher case the amount originally sued on was largely reduced, and you paid it at a compromise figure?

A. I think we paid it at a compromise figure; I don't remember whether or not it was largely reduced.

Q. And in the Hatfield case, Hatfield sued and my wife and me filed a counter-claim and we recovered judgment over against him for three hundred and fifty dollars for defective work and for failure to perform, and he appealed to the Appellate Court and our judgment was affirmed?

A. Something like that, I believe, yes.

Q. So there was not any of these litigations that you have mentioned that was injurious to the trust estate, unless it was the Balke and Krauss litigation; that is correct, is it not?

A. I don't know.

Witness excused.

752 (By Mr. Seyfried:) The record shows the contents of the mechanic's lien by Mr. Rooker, and the defendant would like to put in this much from Order Book 63 showing that the defendants Rooker and Rooker filed motion to strike out the complaint, which motion the court overruled, and the defendants Rooker and Rooker filed demurrer to the complaint of Balke and Krauss; the defendants Rooker and Rooker filed their special answer in three paragraphs to the complaint of Balke and Krauss.

The defendant, by counsel, now offers to introduce in evidence the special finding of facts and conclusions of law, found at page 109, cause of Balke and Krauss Company vs. Rooker, et al., in Order Book 59, for the purpose of showing that Rooker defended the suit on the theory that they did not have a valid lien.

The plaintiffs, by counsel, object to the introduction of this entry unless it is accompanied with the complaint and the answer of Rooker and Rooker.

(By the Court:) I don't think it is competent, gentlemen.

The court, therefore, sustained the objection of the plaintiffs, to which ruling of the court the defendant, by counsel then and there took an exception.

Mr. HENRY SEYFRIED, witness, called for defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, testified as follows:

Direct examination.

Questions by Mr. C. S. Cox:

Q. State your name to the Court?
A. Henry Seyfried.
Q. You are a practicing lawyer?
A. Yes.
Q. General counsel for the Fidelity Trust Company?
A. Yes.
Q. As such general counsel of the Fidelity Trust Company, state whether or not you have had to do with the matters growing out of the trust in the Rooker properties?
A. Yes.
Q. From the beginning to the present time?
A. Yes.
Q. I call your attention to Plaintiffs' Exhibit No. 5 introduced in evidence upon the cross examination of Mr. Fogarty, and I will ask you to state what was done with the complaint in that case?
A. That cause was dismissed by the plaintiff.
Q. You may state to the court how that suit happened to be brought.

The plaintiffs, by counsel, object to that question for the reason it is irrelevant and immaterial, the record speaks for itself, it was brought to foreclose a mortgage, and the motive is not material.

The court sustained the objection of the plaintiffs, to which ruling the court the defendant, by counsel, then and there took an exception.

Q. State whether or not, before this complaint was brought, the plaintiffs in this case had brought any suit involving your mortgage?
A. Dora E. Rooker had brought a suit.
Q. Where was that suit brought?
A. In Marion County.
Q. You may state whether the Fidelity Trust Company interested in that suit?
A. It did.
Q. What was the nature of that suit?

The plaintiffs, by counsel, object to that for the reason that the record in the case is the best evidence.

(By the Court:) He may answer the nature, if he knows the nature, it does not take a record to establish that kind of a fact.

The court then overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

755 By the Court:

Q. What was the nature of the suit?

A. It was an action by Mrs. Dora E. Rooker against the American Central Life Insurance Company and against her husband, I think, in which she sought to have a deed that she holds to the Hamilton County Lands declared a prior mortgage to that of the American Central Life Insurance Company.

Q. And your intervention in that suit was for what purpose?

The plaintiffs, by counsel, object to that, for the reason it is not for him to disclose.

The defendant, by counsel, then withdrew the question.

Q. I will ask you whether your intervention in that case was for the purpose of sustaining the American Central Life Insurance Company mortgage.

A. It was.

The plaintiffs, by counsel, object to that for the reason it is not for him to disclose; the pleadings will tell.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

A. It was, we had paid off this mortgage prior to the commencement of the suit.

The plaintiffs, by counsel, move the court to strike from the record the answer of the witness.

The court sustained the motion of the plaintiff to strike
756 out, and ordered the answer stricken from the record; to which ruling of the Court the defendant, by counsel, then and there took an exception.

Q. I will ask you whether, prior to the commencement of the suit, you had paid the American Central Life Insurance Company, and by you I mean the Fidelity Trust Company?

A. We had.

Q. Now, Mr. Seyfried, there has been something given in evidence in relation to the Balke and Krauss claim; how many Balke and Krauss bills were there?

A. The first payment that the Trust Company was asked to make was for one thousand dollars.

The plaintiffs, by counsel, object to that for the reason that is all in evidence.

(By the Court:) I think so.

A. There were three.

(By Mr. C. S. Cox:) I wanted —Mr. Seyfried has more knowledge than anybody else, perhaps, on this, your Honor, and it has been sought to be emphasized that the last Balke and Krauss claim was forced into litigation through the Trust Company refusing to pay an order for Dora E. Rooker. I feel that the Trust Company should be permitted to clear that up as much as possible.

(By the Court:) What is the difference, as a matter of law in this case.

And further the witness saith not.

757 W. M. FOGARTY, witness, recalled for further

Direct examination.

Questions by Mr. Henry Seyfried

Q. Mr. Fogarty, I hand you Defendant's Exhibit No. 53; you may tell the Court, if you can, what that is?

A. It is a mortgage to the American Central Life Insurance Company of Indianapolis, signed by Dora E. Rooker, William V. Rooker, securing a note of fourteen thousand dollars payable November 19, 1913, with interest coupons.

Q. Is that the same mortgage that was on this real estate at the time the conveyance was made to the Fidelity Trust Company in trust?

A. Yes.

The defendant, by counsel, now offers to introduce in evidence the mortgage which has been marked by the reporter for identification as Defendant's Exhibit No. 53.

The plaintiffs, by counsel, object to the instrument going in unless it goes in in its entirety.

(By the Court:) He offers the mortgage, it may go in.

The plaintiffs, by counsel, object to the introduction in evidence of this mortgage for the reason that it is offered by the Fidelity Trust Company as Trustee and by the Fidelity Trust Company in its corporate capacity proper; that this mortgage was acquired by
758 purchase by the Fidelity Trust Company in its corporate capacity proper, subsequent to the repudiation of this trust by the Trustee, and that this mortgage is the same mortgage described in the complaint to foreclose, filed by the Fidelity Trust Company in this court in cause No. 16755; that this mortgage was acquired by the Fidelity Trust Company in violation of the trust agreement and to protect and fortify a title which the Fidelity Trust Company had acquired adversely, and hostile to the trust estate, and that the Fidelity Trust Company will not be allowed wrongfully to take credit for any payment made or lien discharged in aid of its own wrong.

The court overruled the objection of the plaintiffs, to which ruling of the Court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court Defendant's Exhibit No. 53, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 53.

"This indenture witnesseth That Dora E. Rooker and Wil-
759 liam V. Rooker, her husband, of Hamilton County, in the State of Indiana, Mortgage and Warrant to American Central Life Insurance Company, of Indianapolis, Indiana, the following described Real Estate in Hamilton County, in the State of Indiana, to-wit:

All that part of the Southeast quarter of Section twelve (12), Township Eighteen (18) North, Range four (4) East, lying East of White River. Also all that part of the Southwest Quarter of Section seven (7), Township Eighteen (18) North, Range five (5) East, lying West of the Lake Erie and Western Railroad and East of White River, more particularly described as follows: Begin at the Southwest corner of said Quarter Section; run thence East along and upon the South line of said Section to the Middle of the Lake Erie and Western Railroad as now located; thence following the Middle of said Railroad to its intersection with the North line of the Southwest Quarter of Section seven (7), at a point sixty (60) rods North of the mouth of Stony Creek, and sixty (60) rods North of the center of the Railroad bridge crossing said stream; thence West to the Northwest corner of the said Southwest Quarter; thence following the course of White River in a southerly direction to the Range Line separating ranges four (4) and five (5); thence South upon said range line to the place of beginning, including all sand and gravel deposits at the mouth of Stony Creek. Also all of the West half of the North half of Section Eighteen (18), Township Eighteen (18) North, Range Five (5) East lying West of the Lake Erie and Western Railroad. Also the following described
760 part of the Northeast Quarter of Section thirteen (13) Township Eighteen (18) North, Range four (4) East: Beginning at the northeast Corner thereof; run thence West with the Section line one hundred thirty two (132) rods to the East bank of White River; thence Southwesterly along the East bank of White River with the meanderings of said stream to a point thirty nine & ninety five hundredths (39 & 95/100) rods South of the North line of said Section; thence East Sixty five & eighty hundredths (65 & 80/100) rods; thence South seventy three & fifteen hundredths rods; thence East sixty eight & twenty five hundredths (68 & 25/100) rods; thence North 145 & 62/100 rods to the place of beginning; and all rights and appurtenances thereto belonging, the rents, issues and profits of said real estate, to secure the payment, when the same shall respectively become due, of one principal note of Fourteen thousand and 00/00 Dollars ($14,000.00), payable November 19th, 1913 and Ten (10) coupon or interest notes of Four hundred twenty and 00/100 Dollars ($420.00) each, payable in six

twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four and sixty months, respectively, after date.

All of said notes are dated November 19th, 1908, bear interest at the rate of eight per centum per annum after maturity, and are payable at The Indiana National Bank, Indianapolis, Indiana, with ten per cent Attorney fees, without any relief whatever from valuation or appraisement laws. All of said notes are executed by Dora E. Rooker and are payable to the said mortgagee. Privilege
761 is granted of paying One Hundred Dollars ($100.00), or any multiple thereof on account of said principal note on any interest pay day after one year.

Said mortgagors agree that upon failure to pay any or either of said principal, coupon or interest notes at maturity, or to pay insurance, taxes or assessments, as hereinafter provided, or on failure to comply with each or any of the terms and conditions of this instrument, then all of the debt secured hereby shall become due and collectible at the option of the mortgagee; and it is expressly agreed that upon any such default said company shall be entitled to enter upon and take possession of said mortgaged premises as mortgagee, and to collect the rents, issues and profits thereof, and apply the same on the debt hereby secured, or at its election, it shall thereupon be entitled as of right, to have a receiver appointed to collect the rents, issues and profits arising from said mortgaged premises. The omission of said mortgagee to exercise said option upon any default as aforesaid, shall not preclude it from the exercise thereof upon any subsequent default. Notice of the exercise of said option in regard to any of the matters herein provided for is not required to be given by said mortgagee, said mortgagors hereby waiving any such notice. Said mortgagors hereby agree to keep all legal taxes, charges and assessments on said premises paid, and keep fire, cyclone and lightning insurance on the buildings on said premises to the amount of $2,000.00 of each kind of said insurance in a reliable insurance company or companies, to the approval of said
762 mortgagee, and for its benefit (as its mortgage interest may appear), such interest to be evidenced by a standard mortgage clause, and to deliver all policies of insurance and renewals thereof on said buildings, to said mortgagee, to be held until said mortgage debt is fully paid; and in case of failure by the mortgagors to pay such taxes, charges or assessments, or to procure such insurance, the said mortgagee may, at its election, pay such taxes, charges and assessments and effect such insurance; and any and all sums of money so paid, with interest at the rate of eight per cent per annum from date of payment, shall be and they are hereby made part of the mortgage debt hereby secured.

It is further agreed generally, that said mortgagee may, at its election, advance and pay any sum of money that in its judgment may be necessary to perfect the title of said mortgaged premises in said mortgagors or to maintain such title, or to preserve the security intended to be given by this mortgage, and any and all sums of money so advanced and paid, with interest at the rate of eight per cent per annum, shall be and they are hereby made a part of the

mortgage debt hereby secured. The mortgagors agree to furnish to the mortgagee at each interest pay day evidence of the payment of all past due taxes and assessments.

The said mortgagors hereby expressly agree to pay all and singular the sums of money secured by this mortgage, without relief from valuation and appraisement laws of the State of Indiana, and with ten per cent attorney fees. The mortgagors also agree that
763 they will take proper care of said real estate and buildings thereon, and neither commit waste nor allow waste to be committed, and will neither do nor suffer anything to be done that will impair the value thereof or of the security hereby given, and that the agreements of the mortgagors hereinbefore recited, and the representations below made are made also for the benefit of any assignee of this mortgage and of the debt aforesaid, or of any part thereof. And the mortgagors represent to the mortgagee that the title to said real estate is a good and indefeasible estate of inheritance in fee simple in the mortgagor Dora E. Rooker.

And it is further stipulated and agreed that the mortgagee may, at its option, be entitled to be subrogated to any lein or other claim paid by or with the moneys advanced and hereby secured.

In witness whereof, The mortgagors have hereunto set their hands and seals this nineteenth day of November 1908.

DORA E. ROOKER. [SEAL.]
WILLIAM V. ROOKER. [SEAL.]

STATE OF INDIANA,
Hamilton County, ss:

Before me, the undersigned, a Notary Public in and for said County, this nineteenth day of November 1908, personally appeared Dora E. Rooker and William V. Rooker, her husband and severally acknowledged the execution of the annexed mortgage to be their voluntary act and deed.

Witness my hand and Notarial Seal, the day and year last written.

764 [Seal Notary Public, Indiana.]

F. M. BAKER. [SEAL.]
Notary Public.

My commission Expires 5. 14, 09.'

'No. 5558. Loan No. 395 for $14,000. Mortgage from Dora E. Rooker & husband To American Central Life Insurance Company of Indianapolis, Indiana. I certify That the Within Mortgage was received for Record the 19 day of Nov. A. D. 1908, at 4 o'clock P. M., and recorded in Mortgage Record 52 page 84-5. E. A. Mesbaugh, Recorder Hamilton County. When recorded return to the American Central Life Ins. Co., Indianapolis, Indiana.'

Q. I hand you, Mr. Fogarty, Defendant's Exhibit No. 54, together with a coupon attached, and you may tell the court what that is?

A. It is a first mortgage real estate note payable to the American Central Life Insurance Company, dated November 19, 1908, for the sum of fourteen thousand dollars, due in five years after date, signed, Dora E. Rooker.

Q. Is that the same note secured by this mortgage?

A. Yes; there *as* a coupon also attached for the sum of four hundred and twenty dollars interest.

The defendant, by counsel, now offers to introduce in evidence the note which has been marked by the reporter for identification as Defendant's Exhibit No. 54.

The plaintiffs, by counsel, object to the introduction in evidence of this note for the reason that it is offered by the Fidelity Trust Company as Trustee and by the Fidelity Trust Company in its corporate capacity proper; that this not was acquired by purchase by the Fidelity Trust Company in its corporate capacity proper, subsequent to the repudiation of this trust by the Trustee, and that this note is the same note described in the complaint to foreclose the mortgage, filed by the Fidelity Trust Company in this court in cause No. 16755; that this note was acquired by the Fidelity Trust Company in violation of the trust agreement and to protect and fortify a title which the Fidelity Trust Company had acquired adversely, and hostile to the trust estate, and that the Fidelity Trust Company will not be allowed wrongfully to take credit for any payment made or lien discharged in aid of its own wrong.

And we ask the court for a re-served question of law as to this.

The court overruled the objection of the plaintiffs, to which ruling of the court the plaintiffs, by counsel, then and there took an exception.

The defendant, by counsel, then introduced in evidence and read to the court the defendant's Exhibit No. 54, which Exhibit is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 54.

First Mortgage Real Estate Note to American Central Life Insurance Company of Indianapolis, Indiana.

Number 395 $14,000.00 Dollars.

Indianapolis, Indiana, November 19, 1908.

Five Years after date I promise to pay to the order of American Central Life Insurance Company of Indianapolis, Indiana Fourteen Thousand and 00/100 Dollars. Negotiable and payable at the Indiana National Bank, of Indianapolis, Indiana, with interest at the rate of six per cent. per annum from date until maturity, payable semi-annually which is evidenced by coupon interest notes hereto attached, and with interest at the rate of eight per cent. per annum after maturity until paid, and ten per cent Attorney fees. Value re-

ceived, without any relief whatever from valuation or appraise-
767 ment laws of the State of Indiana. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this Note.

DORA E. ROOKER.

Privelege is granted of paying One Hundred Dollars ($100.00) or any multiple thereof on any interest pay day after one years.' 'Nov. 21, 1913. Assigned without recourse to Fidelity Trust Company of Indianapolis, No. 395. American Central Life Insurance Company, by Frank M. Morrison, Third Vice President. First Mortgage Real Estate Note and Interest Coupons. $14,000. Due Nov. 19, 1913. Interest and Principal Payable at The Indiana National Bank Indianapolis, Indiana. Interest 6% *per cent* payable May and November. American Central Life Insurance Company, Indianapolis, Indiana.'

'$420.00. Indianapolis, Ind., Nov. 19, 1908.

November 19, 1913 I promise to pay to American Central
768 Life Insurance Company Indianapolis, Indiana Four hundred twenty & 00 100 Dollars. Payable at The Indiana National Bank, of Indianapolis, Ind. Value received without any relief whatever from valuation or appraisement laws of the State of Indiana, with interest at the rate of Eight per cent per annum after maturity until paid and Ten per cent Attorney fees. The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and notice of non-payment of this Note.

Note No. 10 secured by Real Estate Mortgage.

395.

DORA E. ROOKER.'

'Nov. 21, 1913. Assigned without recourse to Fidelity Trust Company of Indianapolis. American Central Life Insurance Co. by Frank M. Morrison, Third Vice President.' "

Q. Now, you may state, Mr. Fogarty, whether this is the mortgage and note which you paid with the check you testified about this morning?

A. Yes.

Cross-examination.

Questions by Mr. W. V. Rooker:

Q. Mr. Fogarty, I direct your attention to this memoranda
769 marked Defendant's Exhibit No. 54, purporting to be a promissory note, and ask you to tell the Court if the endorsements which now appear on the back of that instrument, were there at the time you acquired it?

A. Yes, sir, at the time it was delivered to us, they were on there.

The plaintiffs, by counsel, now ask to read the endorsements in evidence.

(By the Court:) It is all in, every word and letter; the whole thing is in.

And further the witness saith not.

The defendant rests.
The plaintiffs rest finally.
And this was all the evidence given in said cause.

770 STATE OF INDIANA,
County of Hamilton, ss:

I, Maude I. Dale, Official Shorthand Reporter of the Hamilton Circuit Court of the State of Indiana, do hereby certify that I am the official shorthand reporter of said court, duly appointed and sworn to report in shorthand the evidence of causes tried therein; that as such shorthand reporter I took down, in shorthand, in the trial of the above entitled cause, a full, true and complete verbatim report of all the oral evidence given and offered by the parties in said cause, and the documentary evidence, and of all the objections thereto and the rulings of the Court thereon, and of all the exceptions thereto; and I do further certify that the foregoing typewritten transcript is a full, true and complete copy, in longhand, made by me, of the shorthand report of said evidence, objections thereto, rulings of the Court thereon, and of the exceptions taken and reserved thereto, and that said longhand transcript of said shorthand report of said evidence contains all the evidence given in said cause.
Witness my hand this 28" day of March, 1919.

MAUDE I. DALE,
Reporter of Hamilton Circuit Court.

Filed Mar. 29, 1919.
CHAS. J. NEWBY,
Clerk Hamilton Cir. Court.

Received of Plaintiffs One hundred and twenty ($120.00) Dollars in full for transcript of evidence.

MAUDE I. DALE.

771 STATE OF INDIANA,
County of Hamilton, ss:

Be it further remembered, That the foregoing typewritten transcript of the evidence so taken and reported, as aforesaid, contains all of the evidence given in said cause, with the objections, and exceptions taken thereto, and the same is now embodied in and made a part of the Bill of Exceptions, and on the 28 day of March, 1919, and within the time allowed by the Court so to do, the Plaintiffs, William V. Rooker and Dora E. Rooker tender this their Bill of Exceptions, which contains a typewritten transcript of the evidence

so taken, as aforesaid, and prays that the same be signed, sealed and made a part of the record in this cause, which is accordingly done this 28 day of April, 1919, and the same is ordered to be certified by the Clerk of this Court, without copying, as a part of the record in this case, and the Court now approves and signs the same, and directs that the same be filed with the seal of the said court and made a part of the record in the said cause.

EARL SAMPLE,
Special Judge of the Hamilton Circuit Court.

Filed Apr. 28, 1919.
[SEAL.] CHAS. J. NEWBY,
Clerk Hamilton Cir. Court.

772 Mr. Charles J. Newby,
Clerk of the Hamilton Circuit Court of Indiana.

SIR:

For the purpose of appeal to the Supreme Court of Indiana in Cause No. 16338, wherein Dora E. Rooker et al. are plaintiffs and the Fidelity Trust Company et al., are defendants, you will please make out and certify over your hand and the seal of the Court, a transcript of the record, pleas and proceedings in said cause including the following, to wit:

1. A transcript *of the transcript* of the record of the Superior Court of Marion County, Indiana, as the same was filed in your office on change of venue.

2. A transcript of the amended complaint with the record of pleas and proceedings had thereon.

3. A transcript of the amended cross-complaint of the Fidelity Trust Company in its corporate capacity proper with the record of pleas and proceedings had thereon.

4. A transcript of the former judgment of the Hamilton Circuit Court of Indiana, in said cause, from which appeal was prosecuted to the Supreme Court of Indiana.

5. A transcript of the proceedings on the receipt and filing of the opinion and judgment of the Supreme Court.

6. A transcript of the proceedings and record on the appointment of the Hon. Earl Sample, Special Judge, to try said cause.

7. A full, true and complete transcript of the record, pleas and proceedings in respect of all papers filed, rulings made, orders entered and judgments rendered when and continuously after the opinion and judgment of the Supreme Court in said Cause were filed in your office and therein you will include the original bill of exceptions containing the evidence and rulings of the court on the trial of said cause.

Filed Apr. 28, 1919. Chas. J. Newby, Clerk Hamilton Cir. Court.

773 8. To said transcript so made and certified you will include the original of this praecipe.

Dated April 28th, 1919.

WILLIAM V. ROOKER,
Attorney for Plaintiffs.

Filed Apr. 28, 1919.
CHAS. J. NEWBY,
Clerk Hamilton Cir. Court.

774 STATE OF INDIANA,
Hamilton County, ss:

I, Chas. J. Newby, Clerk of the Hamilton Circuit Court of the State of Indiana, do hereby certify that the above and foregoing transcript contains a full true and complete copy of all pleadings filed, motions made, orders entered and judgments rendered in cause numbered 16538 of said Court, wherein Dora E. Rooker et al. are plaintiffs and Fidelity Trust Company et al. are defendants as the same appear in the files and records of the office of the Clerk of said Court, and as called for in the praecipe therefor, of the plaintiffs filed in said office on to wit: the 28th day of April, 1919, and as more particularly shown in said praecipe which is hereto attached; and I further certify that the bill of exceptions is the original bill of exceptions filed in said cause at the time and in the manner therein set forth.

Given unto my hand and the seal of said Court this 16 day of June, 1919.

[SEAL.] CHAS. J. NEWBY,
Clerk Hamilton Circuit Court.

June 16, 1919, Received of Plaintiffs Ninety dollars ($90.00) for above transcript.

CHAS. J. NEWBY,
Clerk.

775 And afterwards, to wit: On the same day the following further pleas and proceedings were had in said cause:

Comes now the Clerk of the Supreme Court of the State of Indiana and issues notice of appeal in the above cause, which said notice and return thereon are in the words and figures following:

The State of Indiana to the Sheriff of the Supreme Court, Greeting:

You are hereby commanded to notify Fidelity Trust Company in its Corporate Capacity proper and Fidelity Trust Company as Trustee of the estate of Dora E. Rooker that on the 18th day of June 1919, Dora E. Rooker et al. filed in the Clerk's office of the Supreme Court of Indiana a transcript of the record and proceedings in a certain suit appealed from the Hamilton Circuit Court in which Dora E. Rooker et al. were plaintiffs and Fidelity Trust Company etc. et al. were defendants and notify said appellees that at the expiration of thirty days from the date of service of this writ, said

appeal will be submitted to said Supreme Court; and unless they appear at the Supreme Court room in Indianapolis, before said Supreme Court, and defend said appeal, the same will be proceeded upon in their absence. You are further commanded to make due return of this writ within ten days from date hereof.

Witness, Patrick J. Lynch, Clerk of said Supreme Court, and the seal thereof, at Indianapolis, this 18th day of June, A. D. 1919.

[SEAL.] (Signed) PATRICK J. LYNCH,
C. S. C.

776 Came to hand June 19, 1919.

Served on the within Fidelity Trust Company in its Corporate Capacity proper and on the within Fidelity Trust Company, Trustee of the Estate of Dora E. Rooker by reading to and within the hearing of Wm. M. Fogarty President of said Fidelity Trust Company this 19th day of June, 1919.

GEORGE D. ABRAHAM,
Sheriff.

(Endorsed:) No. 23598. In the Supreme Court. Dora E. Rooker et al. vs. Fidelity Trust Co. etc. et al. Notice to Appellee. Sheriff's Fees, Mileage $.50. Service $.40. Copy $.25. Docket $.10. Postage and Return —. Total $1.25. Marion County. William V. Rooker, Appellants Attorneys.

777 And afterwards, to wit: On the 19th day of July, 1919, being the 48th Judicial day of the May Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause, to wit:

Come now the parties by their counsel, and this cause is submitted to the court for judgment and decree as provided by an act of the General Assembly of the State of Indiana, approved April 13th, 1885, and the rules of said Supreme Court adopted in relation thereto.

And afterwards, to wit: On the 12th day of August, 1919, being the 68th Judicial day of the May Term, 1919, of said Supreme Court the following pleas and proceedings were had in said cause, to wit:

Come now the appellants by counsel and file a petition for extension of time in which to file brief, and on the same day, the court being fully advised, said petition was granted and brief to be filed on or before November 15, 1919.

And afterwards, to wit: On the 12th day of November, 1919, being the 117th Judicial day of the May Term, 1919, of said Supreme Court, the following pleas and proceedings were had in said cause, to wit:

Come now the appellants by counsel and file a petition for extension of additional time in which to file brief, and on the same day, the court being fully advised, said petition was granted and brief to be filed on or before December 16, 1919.

778 And afterwards, to wit: On the 15th day of December, 1919, being the 19th Judicial day of the November Term, 1919, of said Supreme Court the following further proceedings were had in said cause:

Come now the appellants by counsel and file their brief (8) in the words and figures following:

And afterwards, to wit: On the 14th day of January, 1920, being the 45th Judicial day of the November Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellee by counsel and files a petition for extension of time in which to file brief, and on the same day, the court being fully advised, said petition was granted and brief to be filed on or before Febrtuary 20, 1920.

And afterwards, to wit: On the 19th day of February, 1920, being the 76th Judicial day of the November Term, 1919, of said Supreme Court the following further pleas and proceedings were had in said cause:

Comes now the appellee by counsel and files a petition for extension of additional time in which to file brief, and on the same day, the court being fully advised, said petition was granted and brief to be filed on or before March 25, 1920.

And afterwards, to wit: On the 24th day of March, 1920, being the 105th Judicial day of the November Term, 1919, of said Supreme Court the following further proceedings were had in said cause:

Comes now the appellee by counsel and files its brief (8) in the words and figures following, to wit:

779 And afterwards, to wit: On the 25th day of June, 1920, the same being the 29th Judicial day of the May Term, 1920, of said Supreme Court the following further proceedings were had in said cause:

Come now the parties, and the Court being fully advised in the premises, now sets said cause for oral argument for October 14, 1920, and notices thereof are duly issued.

And afterwards, to wit: On the 22nd day of June, 1921, the same being the 27th Judicial day of the May Term, 1921, of said Supreme Court, the following further pleas and proceedings were had herein:

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Willoughby, J.

780 This case is a resumption of proceedings under the mandate of the court in Rooker vs. Fidelity Trust Company 185 Ind. 172. The appellants as settlers of a trust in lands sued appellee who was the trustee alleging a violation and repudiation of the trust and demanding damages, an accounting that the appellee trustee be removed, and that a receiver be appointed for the trust estate to ad-

minister it under the terms of the trust agreement. Appellee on its part filed a cross-complaint in which it set up the same trust and its duties under it as trustee, its performance of all its duties save the sale of the trust estate, its reason for not making such sale, its purpose to carry out the sale and its hindrance by appellants' interference and claim of title. It asked an accounting that its title as trustee be quieted, that appellants be enjoined and that it be decreed to make sale pursuant to the trust agreement and distribution of proceeds accordingly.

Apellants' complaint was answered by appellee trustee by general denial. Issue was formed on the cross-complaint of appellee trust company by answer of general denial and by special partial answers, the issues on the latter being made by replies in general denial. On these issues the cause was submitted to the court for trial, and the following special findings of facts and conclusions of law were made and stated by the court.

The court finds the facts to be:

First. That on and prior to the 11th day of October, 1909, the plaintiff, Dora E. Rooker, was the owner in fee simple of certain real estate situate in Hamilton County, Indiana.

Second. That on and prior to the 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entireties, of certain real estate situated in Marion County, Indiana.

Third. That on the said 11th day of October, 1909, said plaintiff Dora E. Rooker and William V. Rooker, her husband, executed and delivered to said cross-complainant, Fidelity Trust Company, a trustee, their warranty deed for the lands in Hamilton County,

781 "* * * To have and to hold, said real estate, however, in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee.

And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part of all of said real estate and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances. And to do any and all acts and to execute any and all papers, which may be neces-

sary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

And in the event any such liens or charge against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforcible by it and collectible with interest at the rate of 6% per annum, to be credited semi-annually as a debit and charge against said real estate.

This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of certain principal note of said grantor in the sum of Fourteen Thousand ($14,000) Dollars together with interest thereon and recorded in mortgage record 52, page 84, in the office of the Recorder of Hamilton County, Indiana."

That said Indenture by Dora E. Rooker and William V. Rooker her husband, was received for record on the 14th day of October 1909 and recorded in record 97, at page 117, in the Recorder's office of Hamilton County, Indiana.

Fourth. That on said 11th day of October, 1909, the plaintiff William V. Rooker and Dora E. Rooker, husband and wife, executed and delivered to said cross-complainant Fidelity Trust Company as trustee, their warranty deed for the lands in Marion County.

* * * To have and to hold said real estate, however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee, as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days' notice in writing, to be given to the grantors or the trustee herein, the trustee may publicly advertise said real estate and sell the same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of In-

dianapolis Trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner
783 and for the *purposes set out in* the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

The said Fidelity Trust Company of Indianapolis, as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to preserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis as trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforcible in its hands, together with interest thereon at the rate of 6% per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

This conveyance is made subject to the taxes for the year 1908 and 1909 and subject also to certain mortgage executed March 12 1909, by the grantors, William V. Rooker and Dora E. Rooker husband and wife, to the Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of six thousand ($6,000) dollars and interest coupon notes thereon which mortgage is recorded in mortgage record 523, page 128, in the office of the Recorder of Marion County, State of Indiana."

That this Indenture was received for record on the 14th day of October, 1909, and recorded in Record 52, page 101, in the office of the Recorder of Marion County, Indiana.

Fifth. That contemporaneously with the execution of the two warranty deeds executed on the 14th day of October, 1909, to said Fidelity Trust Company, Trustee, and as part of the same transaction, the plaintiffs Dora E. Rooker and William V. Rooker, as first parties and the defendant and cross-complainant, Fidelity Trust Company of Indianapolis, Indiana as second party, executed in duplicate on the 14th day of October, 1909, a memorandum of contract in writing.

784 (This memorandum or contract in writing is set out in full in the opinion in Rooker vs. Fidelity Trust Company, 185 Ind. beginning on page 173).

Sixth. That since the execution of said warranty deeds and said written memorandum, the plaintiff, Dora E. Rooker, has continued in the possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the

plaintiffs, William V. Rooker and Dora E. Rooker, have continued in the possession of and farmed all of the real estate situated in Marion County, Indiana, and are now in possession thereof.

Seventh. That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff, Dora E. Rooker, has received all of the proceeds arising out of the Hamilton County real estate and has not at any time rendered an accounting to the Fidelity Trust Company, Trustee, and the plaintiffs, William V. Rooker and Dora E. Rooker have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company, trustee.

Eighth. That Fidelity Trust Company, trustee, has not sold or conveyed any of the real estate conveyed to it by plaintiffs and that the title of the same is now in the said Fidelity Trust Company, trustee, and that said Fidelity Trust Company is not claiming or asserting any other title than the title and right set forth in the deeds of conveyance and memorandum of trust, hereinbefore set out in these findings.

Ninth. That prior to the commencement of plaintiff's action namely on or about the 15th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company, Trustee, served a written notice upon the plaintiffs demanding the payment of certain sum aggregating Nineteen Thousand Six Hundred Dollars and Four ($19,600.04) Cents and tendered for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County lands to the original grantors upon the payment of the aforesaid sum upon demand and stating that said quit claim deed will remain in the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the demand.

785 Tenth. That the plaintiff, Dora E. Rooker, in the constructing of her dwelling house on the Hamilton County land contracted large liabilities to various persons, firms and corporations for work and labor done and material furnished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said Fidelity Trust Company, Trustee, under said contract and upon the security evidenced by said two separate warranty deeds, and agreement of trust, all executed and delivered October, 11, 1909, did from time to time thereafter upon the written order and direction of the plaintiff Dora E. Rooker, first pay out the total sum of Six Thousand ($6,000) Dollars and did further, after paying on the written order and direction of said Dora E. Rooker the total sum of Six Thousand Dollars let out and expend a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the plaintiff Dora E. Rooker issued from time to time to the defendant and cross-complainant Fidelity Trust Company, directing the payment of certain obligations showing on their face

the nature of the claim, the amount thereof, and the party to whom payment should be made, and that the signature affixed thereon is the signature of the plaintiff, Dora E. Rooker.

Eleventh. That said Fidelity Trust Company made payment on such written orders issued from time to time by plaintiff, Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff, Dora E. Rooker, and receipted by the respective parties in whose favor the voucher is drawn aggregating the sum of $15,813.21.

Twelfth. The said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts aggregating the sum of $21,194.27.

Thirteenth. That no assets came into the possession of the Trustee other than lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Indiana, a corporation engaged in the business of operating a trust company under the laws of the state of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

786 Fourteenth. That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, Trust, is entitled to have and receive for its compensation, a trustee's fee of one hundred and fifty ($150.00) Dollars which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of two (2) per cent on loans and advancements and all moneys laid out and expended, of which One Hundred and Twenty ($120) Dollars has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant is further entitled to have and receive interest on all moneys loaned or advanced at the rate of six (6) per cent per annum.

Fifteenth. That the plaintiffs are entitled to the following credits, to-wit: Ninety-five ($95.00) Dollars, together with interest thereon at six (6) per cent from October 16, 1909, on account of the cancellation of insurance policy of Six Thousand ($6,000) Dollars, said sum having been charged against plaintiffs under order and voucher dated October 16, 1909; also a credit of Five Hundred ($500) Dollars with interest at four (4) per cent from August 26, 1910, less Fifteen ($15) Dollars deducted from the principal amount as a premium upon the Surety Company bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company as collateral on a supersedeas in the case of William V. Rooker and Dora E. Rooker vs. Ludowoco Caladon Company in the appellate court, which cause was affirmed on appeal and upon the judgment being paid said security of deposit returned; also a rebate of Four Hundred and Two and 81-100 Dollars

($402.81) representing the various amounts of penalties and costs including in various payments for taxes on the Marion County Lands.

Sixteenth. There is now due and owing to the defendant and cross-complainant herein from the plaintiffs' cross-defendants herein, the principal sum of Thirty-seven Thousand and Seven and 48/100 ($37,007.48) Dollars; and for the interest thereon, the aggregate sum of Fourteen Thousand Two Hundred and Twenty-one and 29/100 ($14,271.29) Dollars; and for commission at two (2) per cent on all funds paid out in excess of six Thousand ($6,000) Dollars the aggregate sum of Six Hundred and Twenty and 87 14/100 ($620.14) Dollars from which there shall be deducted the aggregate sum of Nine Hundred Eighty-two and 81/100 ($982.81) Dollars, together with interest thereon amounting to Two Hundred and Eighteen and 51/100 ($218.51) Dollars, being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein in the sum of Fifty Thousand Six Hundred and Ninety-seven and 59/100 ($50,697.59) Dollars.

Seventeenth. That all the amounts advanced and paid out by the defendant Fidelity Trust Company, Trustee, as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate and were so said out for the personal use and benefit of the plaintiff, Dora E. Rooker, and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, Trustee, is entitled to reimburse itself therefor according to the terms of said trust agreement by the sale of said lands therein provided.

Eighteenth. That on the 21st day of June, 1917, the defendant Fidelity Trust Company, as Trustee, served a notice upon William V. Rooker and Dora E. Rooker of which the following is a copy:

To William V. Rooker and Dora E. Rooker:

Pursuant to the provisions of the deed of conveyance executed to the undersigned as Trustee, on the 11th day of October, 1909, conveying to the undersigned as Trustee, the following described real estate in Marion County, State of Indiana, to wit: The southeast quarter of the northeast quarter of §33, Township 17 north, range 4 east, containing 40 acres more or less; also the southwest quarter of the northwest quarter of §34, Township 17 north, range 4 east, containing 40 acres, more or less, and the memorandum executed concurrently therewith, notice is hereby given that the Fidelity Trust Company as Trustee will ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the pur-

chaser. Dated at Indianapolis, Indiana, this 21st day of June, 1917.

788 FIDELITY TRUST COMPANY,
Trustee.

By W. M. FOGARTY,
President.

Attest:

JAMES G. FLAHERTY,
Secretary."

Nineteenth. That after the execution of said deeds of conveyance and written memorandum set forth in paragraphs of this finding designated third, fourth and fifth, and prior to the demand for repayment and tender of deed of reconveyance set forth in the ninth paragraph of this finding, the plaintiff, William V. Rooker acting for himself and his wife, and co-plaintiff, Dora E. Rooker, did on several occasions express and convey to defendant, the Fidelity Trust Company, their intentions to pay off the advancements, more specifically set forth in this finding, theretofore made by it under said deeds and memorandum and take reconveyance of said land and otherwise by their course and conduct did induce said demand for repayment and tender of reconveyance.

Twentieth. That said Fidelity Trust Company, Trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said trust agreement, hereinbefore set out, but that said Marion County Lands were not sold within one year after the execution of said memorandum and deeds, and have not yet been sold by said trustee under said trust provisions that ninety (90) days' notice in writing was given, as set forth in the previous findings, notifying the plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that the plaintiffs have been, were then, and are now asserting an interest in said lands adverse to the rights of said Trust Company, as trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands, adverse to the right of the said Trust Company, as trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above.

That the plaintiffs, in open court, have disputed and now
789 deny the right of the said Trust Company as Trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and now are resisting the sale of said lands or any of them by said Trustee, and are now prosecuting an appeal in the appellate court from a judgment of the Marion County Circuit Court quieting the title of the Marion County lands in said Fidelity Trust Company as Trustee, and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as trustee

to said Marion County lands and from denying, disputing, obstructing or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust.

That the assertion of interest in said lands by plaintiffs as herein above stated adverse to the interest of Fidelity Trust Company as trustee under said trust agreement is unfounded and without right.

Upon the foregoing facts the court states the following conclusions of law:

1. The law is with the defendant on the issues joined on plaintiffs' complaint.

2. The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

3. The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant, Fidelity Trust Company, trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

4. The defendant and cross-complainant, Fidelity Trust Company, is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

5. The defendant and cross-complainant is entitled to judgment on account in the sum of $50,697.00 to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

790 6. The defendant and cross-complainant is entitled to recover its costs in this action taxed at $——.

The court having found the facts specially and stated its conclusion of law thereon, now renders judgment accordingly.

It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by mak-

ing distribution of the proceeds according to the terms of said deed and trust agreement and not otherwise, and is no other capacity. That said defendant and cross-complainant, Fidelity Trust Company, as such trustee holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deed of warranty of the fee simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen, (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

791 Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13) township, eighteen (18) north, range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 113.2 rods to the place of beginning; containing seventy-five (75) acres more or less, situated in Hamilton County, Indiana.

And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east containing forty (40) acres, more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east containing forty (40) acres more or less situated in Marion County Indiana.

It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, Trustee, is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deed of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker

under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee *in* wrongful, without right and
792 unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as Trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as such trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof, in possession; that said Marion County Lands having failed to sell for the sum of Eighteen Thousand ($18,000) Dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County Lands do not sell for lack of a bid, then said Trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-five Thousand ($65,000) Dollars; that if said Hamilton County lands do not sell for said sum of Sixty-five Thousand ($65,000) Dollars, for lack of a bid for that sum, then said trustee, after ninety (90) days notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for what
793 ever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County Lands, under this decree they do not fetch enough to pay the moneys and perform the obligation against said trust estate, in this action found to exist and to be due, then said trustee shall after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

1. To the payment of the costs of this action.

2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

5. The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

From this judgment and decree appellants appeal and allege errors relied on for reversal as follows:

1. In overruling motions to strike out the appellee's second amended counterclaim.

2. In overruling the demurrers to the second amended counterclaim for insufficiency of facts.

3. In overruling motion to make second amended counterclaim more specific.

794 4. In overruling appellants' motion for judgment on the special findings.

5. The trial Court erred in its conclusions of law.

6. In overruling appellants' motion to modify the judgment.

7. In overruling appellants' motion for a new trial.

The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counterclaim and cross-complaint of appellee. An examination of the record discloses that the pleading to which reference is here made was appellee's cross-complaint as amended after the decision of this court in the case of Rooker vs. Fidelity Trust Co., 185 Ind. 172.

The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court in this case and the exhibits attached to said cross-complaint no sufficient cross-complaint or counterclaim could have been written against appellants. This phase of the case need not be discussed in disposing of these motions for it is settled law that error can not be

predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading. Woodhams vs. Jennings, 164 Ind. 555; Pfau vs. State ex rel. 148 Ind. 539.

In support of their second alleged error appellants claim that the appellee trust company could not in any event, by counterclaim sue the appellants on the subject matter of the trust estate on the facts set up in the counterclaim for the reason that the counterclaim is not relevant or germane to the complaint.

The arguments presented by appellant in favor of their demurrers are in substance that the appellee was guilty of wrongful management of the trust property and sought to acquire title to it by wrong doing and that the trustee elected to repudiate the trust agreement and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost, and it has no right to recover the sums of money expended by it for the use and benefit of the appellants.

A counterclaim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant or which would tend to reduce the plaintiff's claim or demand for damages. Burns 1914, §355.

A counterclaim is good and germane to the principal case if it alleges matters connected with the subject of the original action.—Standley vs. N. W. Ins. Co., 95 Ind. 254.—Excelsior Clay Works vs. De Camp 40 Ind. App. 26.

A counterclaim under code provisions like ours is the equivalent of the cross bill in equity and in addition includes common law recoupment.—Woodruff vs. Garner 27 Ind. 4.

The purpose of a crossbill is to obtain full relief for all parties and a complete determination of all controversies which arise out of the matters charged in the original bill.—40 R. C. L. p. 483, §261 seq.

In this case the transaction having been brought into a court of equity by appellants it was not only the right of the court to entertain a crossbill which would settle all the rights of all the parties in and of their relations in the subject matter, but it was the duty of the court if necessary, to require a cross bill to be filed which would enable it to completely settle the controversy.—See Sims vs. Clerk, 109 Ind. 214.

A party who imagines he has two or more remedies or who misconceives his rights is not deprived of all remedy because he first tries the wrong one.—Bunch vs. Graves 111 Ind. 351.—Nave vs. Powell 62 Ind. App. 274.

The doctrine of election of remedies is of equitable origin. It has no application to the circumstances of this case for to apply it here would work to the great harm and loss of the appellee trust company, and the unearned and undeserved large money benefits of appellants, moreover it does not apply unless in fact, two remedies are available, which is not true in this case, as the Supreme Court has decided in 185 Ind. 172. The court did not err in overruling the demurrers to the second amended counterclaim.

In support of their third alleged error the appellants argue at

length that the counterclaim was illegal. The object of a motion to make a pleading more specific is to require the pleader to state with certainty what is vaguely stated in the pleading.

Elliott's App. Proc. §665.

Failey vs. Gribbling, 128 Ind., 110.

796 The appellee, in its counterclaim set up very fully and in circumstantial detail the trust and its relation to it, and its title and doings as trustee, and the items of its account and the circumstances requiring the aid of the court in finally carrying out and closing the trust. There is no uncertainty or vagueness of statement and it is not claimed by appellants that there is. Their motion is based on what they call the illegality of the claim. The court did not err in overruling their motion to make more specific.

The court error relied on for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment on a special finding of facts is not recognized by our practice. It is elementary that the sufficiency of the evidence to sustain the finding is raised by a motion for a new trial and that questions of law raised by the conclusions of law stated on a finding can be presented only by exceptions taken to the conclusions of law. The court did not err in overruling appellants' motion for judgment on the special finding of facts.

It appears from the record that after the court filed its special findings of facts and conclusions of law thereon, the plaintiffs each respectively moved the court for judgment in their favor on the special finding of facts and when such motions were overruled they excepted to the conclusions of law. Under such circumstances the exceptions are not available.

Exceptions to conclusions of law upon facts specially found must be taken before the taking of any other step in the cause by the excepting party.—Dickson et al. vs. Rose 87 Ind. 103. See also Barner vs. Bayless 134 Ind. 600.—Chicago R. R. vs. State ex rel. 159 Ind 237.—Medical College vs. Commingore 140 Ind. 296.

Though it was taken on the same day that the ruling was made, an exception will not be available if it was not taken until after additional steps in the prosecution or defense of the case had been taken by the party reserving it.—Ewbank's Manual (2d. Ed.) §246.—Dickson v. Rose 87 Ind. 103.—Barner vs. Bayless 134 Ind 600.

797 The correctness of the conclusions of law can not be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law.—Chicago S. E. Ry. Co. vs. State ex rel. 159 Ind. 237. The judgment rendered in this case was in conformity with the conclusions of law.

The seventh error relied on for reversal by appellants is that the court erred in overruling their motion for a new trial. In support of their contention to show that the court erred in overruling said motion the appellants say that the cause was put at issue and tried on an unlawful cross-complaint; and that therefore the judgment

was contrary to law. This contention was decided adversely to appellants in our ruling on the demurrers to the cross-complaint and counter claim. The brief of appellants does not contain a condensed recital of the evidence in narrative form as required by the rules.

A statement of the evidence mixed with statements and arguments of counsel, propositions of law and citation of cases and which clearly does not purport to cover the entire evidence, does not comply with the rules of this court and does not command a consideration of a motion for a new trial involving the evidence. Rose vs. City of Jeffersonville, 185 Ind. 577 and cases there cited. No question is presented on the sufficiency of the evidence.

No reversible error is shown in the record.

Judgment affirmed.

798 And afterwards, towit: On the 11th day of August, 1921, the same being the 70th Judicial day of the May Term, 1921, of said Supreme Court the following further pleas and proceedings were had herein:

Comes now the appellants by counsel and file their petition and brief (8) for a rehearing herein, which petition is in the words and figures following:

In the Supreme Court of Indiana.

No. 23598.

DORA E. ROOKER, WILLIAM V. ROOKER, Appellants,

vs.

FIDELITY TRUST COMPANY, in Its Corporate Capacity Proper; FIDELITY TRUST COMPANY, as Trustee of the Estate of Dora E. Rooker.

Appeal from the Hamilton Circuit Court.

Appellants' Petition for Rehearing.

The appellants and each of them respectfully petition the court for a rehearing in the above entitled cause on each of the following grounds, towit:

First. That the opinion and judgment of the Supreme Court of Indiana is erroneous in sustaining the judgment of the Hamilton Circuit Court of Indiana, which was erroneous in sustaining the constitutionality of the act of the General Assembly of Indiana entitled "An Act concerning proceedings in civil and criminal cases," approved March 15, 1913 (Acts 1913, page 850) which said act impairs the obligation of the trust agreement made and entered into on

799 the 11th day of October, 1909 by and between the appellant, Dora E. Rooker her husband and co-appellant, William V. Rooker, joining with her, and the Fidelity Trust Company,

as trustee, whereby said Dora E. Rooker appointed and constituted the Fidelity Trust Company trustee, to assume and perform certain trusts and powers stated and defined in the written memorandum of said contract and which said trust said Fidelity Trust Company, as trustee accepted and undertook to perform upon the terms and in the form and manner prescribed in said contract, said contract being the same contract in issue in this suit, and because said statute so impairs the obligation of said contract said statute is in contravention of Article I, section 10 of the constitution of the United States and is void.

Second. That the opinion and judgment of the Supreme Court of Indiana is erroneous in sustaining the judgment of the Hamilton Circuit Court of Indiana, which was erroneous in that it denied to these appellants, and to each of them due process of law and the equal protection of the laws for the defense of their property and the enforcement of their rights, in contravention of the Fourteenth Amendment of the Constitution of the United States, said denials of due process and of the equal protection of the laws being in each of the particulars following towit:

1. Said judgments and each of them deny to these appellants and to each of them the common, ordinary and usual remedies of the law for the defense and enforcement of their rights of contract affected in the premises as hereinafter more specifically set forth.

2. Said judgments and each of them take the property of these appellants and each of them without their having had their day in court upon any issue tendered by any person competent and qualified to sue for the determination of said rights of property or any of them.

800 Third. That the opinion and judgment of the Supreme Court of Indiana is coram non judice and void because of the participation therein of Judge Louis B. Ewbank, a member of said court who was incompetent and disqualified to sit because of adverse interests in his behalf then and there existing, had and entertained by him, apparent on the following facts:

(1) There was introduced and read in evidence on the trial of this cause in said Hamilton Circuit Court, over the objections of these appellants a transcript of the record of the judgment of the Marion Circuit Court of Indiana in cause No. 25260; that in said cause 25260 these appellants were plaintiffs and George V. Coffin, as Sheriff of Marion County, in the State of Indiana and the Fidelity Trust Company in its corporate capacity proper were defendants; that said suit was to the effect that certain unlawful liens and incumbrances had been placed on certain Marion County lands of these appellants by means of pretended sheriff's sales thereof; that said Marion County lands are the identical Marion County lands described in the deed of trust herein as being the Marion County lands of these appellants conveyed to said trustee; that said sheriff's sales were made upon a certified copy of the judgment and decree

of said Hamilton Circuit Court which judgment and decree was thereafter set aside and vacated by this court on the 5th day of October, 1915 (185 Ind. 172); that in and by their said action these appellants as said plaintiffs sought to have the title of, in and to said Marion County lands cleared of the cloud placed thereon by said sales; that said action was begun by these appellants, as said plaintiffs, filing their complaint in the office of the clerk of said Marion Circuit Court and causing summons to issue thereon for the defendants named; that said complaint was filed on to wit, the 26th day of May, 1915; that Charles E. Cox, Esq., at present
801 one of the attorneys in this cause of said Fidelity Trust Company was a judge of the Supreme Court of Indiana, at the time said opinion and judgment of this court was rendered on the 5th day of October, 1915, reversing said judgment and decree of said Hamilton Circuit Court, and apparently he participated in the rendition of said judgment of this court and concurred therein; that when he retired from membership in this court said Cox appeared as attorney and counsel for appellee the Fidelity Trust Company in the matters in controversy in this suit affecting this trust and he with another, filed in said cause No. 25260 in said Marion Circuit Court the cross complaint of said Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, and caused summons to be issued on said cross complaint for said Dora E. Rooker and William V. Rooker; that said cross complaint was on the theory that said cross complainants had been continuous and faithful in the performance of their duties in the administration of said trust and that they had faithfully performed said duties; that said Dora E. Rooker and William V. Rooker had by their said trust deed conveyed all their interest in said trust estate; that said Dora E. Rooker and William V. Rooker were wrongfully and unlawfully meddling with said property and were interfering with and preventing said defendants from performing the duties required in the administration of said trust; that said Dora E. Rooker and William V. Rooker should be adjudged to have no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that throughout said proceedings said Cox had appeared in his individual name and not in the name of his firm, Woollen, Cox & Welliver, of which firm Mr. Evans Woollen is and for many years last past has been president of the Fletcher Savings and Trust Company, one of the oldest and one of the largest trust com-
802 panies in Indiana; that said Ewbank, as said judge of said Marion Circuit Court found against these appellants as plaintiffs in said cause and he sustained said cross complaint on the trial of said cause and rendered judgment accordingly, including that these appellants there present as plaintiffs in said complaint and as defendants in said cross complaint had no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that said judgment was given and rendered by said Ewbank on the 5th day of February, 1918, and he fixed the penalty of the appeal bond therein at five thousand dollars,

which these appellants were unable to give because their property was in the hands of said trustee; that on the 29th day of May, 1918, these appellants, as said plaintiffs, filed in the office of the clerk of this court their certified copy of the record proceedings and judgment of said Marion Circuit Court in said cause No. 25260, together with assignments of error thereon and caused notice to be issued thereon; that said cause was docketed in this court as cause No. 23477 but was afterwards transferred to the docket of the Appellate Court of Indiana as Cause No. 10414, where the same is pending for decision; questions at issue in said Cause No. 25260 and determined by said Ewbank and carried into the record in this cause by the introduction in evidence in this cause of said judgment in said Marion Circuit Court in said cause No. 25260, embody issues involved in this appeal, all to the effect that said Ewbank in sitting as a judge in this cause in this court is required to pass upon his own errors while sitting as a judge in said cause No. 25260 in said Marion Circuit Court; that said action of said Ewbank in sitting in the determination of this court is beyond the precedents and traditions of this court; that appellants knew that said Ewbank sat
803 with the other members of this court at the oral argument of this cause, but appellants then believed, as they lawfully might do, that he came upon the bench without information as to the nature and issues of this cause and that he would recuse himself and not participate further when he became informed, but appellants say that the memorandum of the opinion of this court filed in the office of its clerk in this cause, contains no notation that said Ewbank did not sit and that the text of the said opinion as published in the advance sheets of the North Eastern Reporter does not disclose that said Ewbank did not sit; that it is a custom and usage and may be said to be a rule of this court, to note on the memorandum of opinions and judgment where a judge does not participate in the decision of a cause, and, knowing these things and upon the information they impart and believing them to be true, appellants say that Judge Ewbank sat in the determination of this cause when he was incompetent and disqualified to sit.

(2) And as to the further interest of Judge Louis B. Ewbank in the matters and things involved in this cause and the proceeds to be established thereby to the benefit and advantage of himself, appellants say that in and by the last will and testament of one Volney T. Malott, late of said Marion County, the said Louis B. Ewbank was nominated and appointed co-executor and co-trustee of the estate of said Malott, valued at many millions of dollars and embracing holdings of stock in banks and trust companies competent under the law to accept and execute trusts of the kind and character of the trust involved in this suit; that among said holdings of stock in banks and trust companies by said Ewbank and his co-executors and co-trustees are First National Bank, Bristol, Indiana, stock valued at $30,000.00; Indiana National Bank, Indianapolis, Indiana, stock valued at $662,500.00; Union Trust Company, Indianapolis, Indiana, Stock valued at $65,000.00; that it would be

greatly beneficial to said banks and trust companies and enhance the value of the stock of said banks and trust companies to have the law established as being that trustees were not liable for the maladministration of their trusts nor for the waste and conversion of their trust estate and that a trustee could not be held to respond to the complaint of a cestui que trust that the trustee was guilty of maladministration of a trust and waste and conversion of the trust estate and that there was no party in interest competent to invoke the jurisdiction of a court to command a trustee to fidelity in the administration of a trust, nor to invoke the jurisdiction of a court to determine that a trust agreement, of the nature and kind affected by this suit, could be adjudged to have been repudiated by the trustee and thereupon rescinded by the parties aggrieved, nor to invoke the jurisdiction of a court to remove a trustee who was at fault and to sequester the trust estate by the appointment of a receiver therefor to the end that the trust estate could be administered for the benefit of all the parties in interest and not solely for the benefit of the trustee; that said Volney T. Malott departed this life June 14, 1921 at said Marion County; that at the time of his death he was more than eighty years of age; that on the 8th day of March, 1916, said Malott, knowing his advanced years and comprehending the near approach of his death in the usual processes of nature, executed his said will wherein he nominated the said Louis B. Ewbank together with Thomas H. Kaylor and John Malott Fletcher coexecutors of his said will with the right of survivorship and in and by his said will he appointed said Ewbank, Kaylor and Fletcher cotrustees of his estate, with the right of survivorship, said trusteeship to become effective when the statutory period had expired for the administration of said estate and the final settlement thereof, usually a minimum of thirteen months after the issuance of letters, and said trusteeship was thereafter to continue in said Ewbank, Kaylor and Fletcher, and in the survivor of them, until the second day of March, 1944, an approximate period of twenty-three years, when said trust was to be closed and the proceeds thereof distributed as provided in said will; said trustees to take credit for their charge including certain annual charges payable out of the income of said estate; that said Kaylor and Fletcher are bank clerks and said Ewbank is the only lawyer among said coexecutors and said cotrustees; that these appellants are informed and believe, and upon information and belief state the fact to be, that said Ewbank knew of his appointment and executorship and trusteeship and of the interests, duties, rights, powers and obligations and all the circumstances thereof, when the same was made and that he had such knowledge on the 5th day of February, 1921, when as Circuit Judge he heard and determined said cause No. 25290 in said Marion Circuit Court, that these appellants did not, nor did either of them have, any knowledge whatsoever as to the said will of said Malott nor as to any provision thereof, nor as to the appointment of said Ewbank as such coexecutor and cotrustee until after said will was probated in the Probate Court of said Marion County on the 20th day of June, 1921, when the pro-

visions of said will were set forth in the daily newspapers and those publications imparted to these appellants, and to each of them, the first information and the first means of information, they, and each of them, had as to said last will and testament and as to any of its provisions and that said Ewbank had any of the interests, duties, rights, powers, opportunities and purposes which he now has, holds, entertains and enjoys; that upon the probate of said last will and testament said Ewbank duly accepted said trust and qualified and is now a duly incumbent co-executor of said will and he intends to and will perform the office of said trust until the time arrives
806 when he should qualify as co-trustee of said estate, valued at many millions of dollars, under said will; that he intends to, and then will, assume the office of said co-trustee and qualify as such; that prior to the decision of this case by the Supreme Court of Indiana, it always had been the law of this state that the maxim prevailed, nemo debet esse judex in propria sua causa—no one ought to be a judge in his own cause—and that judicial proceedings were void where the judge who made the ruling had an interest which might affect him in the performance of his duty in the premises; that upon the premises the said judgment of said Marion Circuit Court in said cause No. 25260 was unlawful and void and its introduction in evidence on the trial of this cause was unlawful and the participation of said Ewbank in the consideration of this cause was unlawful and denies to these appellants and to each of them due process of law and the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

Fourth. The opinion and judgment of the Supreme Court of Indiana wrongfully and unlawfully burdens, obstructs and defeats the rights of these appellants to present for consideration the federal questions, and each of them, that said opinion and judgment impairs the obligations of plaintiffs' said trust contracts of October 11, 1909, in contravention of Art. I, sec. 10 of the Constitution of the United States, and that said opinion and judgment deprives these appellants and each of them of property without due process of law, and *denys* to these appellants and each of them the equal protection of the laws, all in contravention of the Fourteenth Amendment of the Constitution of the United States; that said opinion and judgment does so burden, obstruct and defeat the said rights of these appellants
807 and each of them to present said Federal questions and each of them by (1) wrongfully and unlawfully adding to the terms and conditions imposed by the Supreme Court of the United States upon which a Federal question may be raised and presented, certain alleged rules, interpretations and dicta and (2) by erroneously, wrongfully and unlawfully construing and applying said alleged rules, interpretations and dicta as applied to this case and all in the form and manner and to the effect following, that is to say: In appellants' original brief on the merits filed in the Supreme Court of Indiana in this cause, on towit the 15th day of December 1919 the following appears, beginning on page 286, towit:

"Proposition B. Second Error.

The judgment of the trial court denies to the trust estate due process of law and takes the property of the trust estate without the equal protection of the law, and impairs the obligation of the trust contract.

Point 1.

"Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, What constitutes due process of law? arises as often when judicial action is in question as in any other cases. * * * The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, first, of the subject matter; and, second, of the persons whose rights are passed upon."

Cooley's Const. Lim. 6th Ed. p. 491.
Windson v. McVeigh, 93 U. S. 274, 277.
Pennoyer v. Neff, 95 U. S. 714.
Huling v. Kaw Valley Ry. 130 U. S. 564.
Scott v. McNeal, 154 U. S. 34, 46.
New Orleans Water Works, v. New Orleans, 164 U. S. 471, 480.

Point 2.

In this case there is no personal judgment against these appellants, but there is against them a judgment in rem quieting title, 508 etc. There is a judgment in rem defining the nature of the appellees' interest in the trust estate and stating the value thereof to be $50,697.50.

Ante, p. 216; Tr. p. 340, ll. 22-30; p. 341 ll. 1-8.
Ante, pp. 50-51; Tr. p. 348, ll. 9-30; ll 1-7.
Ante, pp. 187-8, Particular No. 8.
Ante, pp. 188-9, Particular No. 9.
Ante, pp. 272-3.

Point 3.

On the complaint, the court found against the appellants as plaintiffs and that they had no right to maintain this, their action. And judgment was rendered accordingly. The judgment against the appellants as plaintiffs included an injunction against the plaintiffs including these words, viz: "It is further considered, adjudged and decreed by the court that said plaintiffs Dora E. Rooker and William V. Rooker by said deed of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and to the right of possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of sale thereof as may remain to be distributed to said Dora E. Rooker under this judgment and said trust agreement; that any other interest in or control over said lands than such interest in

the proceeds aforesaid, heretofore and now being asserted by said plaintiffs adverse to the title of said trustee is wrongful, without right and unfounded and obstruction of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are hereby each and both perpetually enjoined from denying or disputing the said title of said Fidelity Trust Company as trustee, to said lands above described and its right to the possession, use, rents and profits thereof and from denying or disputing the said title of said Fidelity Trust Company as trustee, to said lands above described and its right to the possess-, use, rents
809 and profits thereof and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale conferred by said deeds and trust agreement and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or purchasers in giving possession or taking possession when sale shall have been made as aforesaid."

Ante, pp. 50-51; Tr. p. 348, ll. 9-30; p. 349, ll. 1-7.

Point 4.

The judgment of the court in the particular noted under Point 3 supra, was the mere consummation of a wrong theory adopted by the trial court at the beginning, viz: That these appellants had no interest whatsoever in the premises and were therefore incompetent to produce any issue upon which the appellees were obliged to respond.

Ante, pp. 158-275: How the errors relied upon arise upon the record.

Point 5.

The issues tendered by the cross complaint were not brought into the record as by answer or counter claim upon summons directed by the plaintiffs to the defendants. On the contrary, the cross complainants adopted and pursued the trial court theory that their right of recovery was on a distinct action which required a writ of summons to issue in their behalf. This writ of summons was directed not against the nominal trustee nor against any person so representing the trust estate. The entry follows, viz: "And the court now orders the clerk of this court to issue summons on said cross complaint to said Dora E. Rooker and William V. Rooker, said summons to be returnable on the 7th day of April, 1913. Tr. p. 15, ll. 7.10.

810 Point 6.

Appellees are bound by their trial court theory that appellants were incompetent to bring and did not bring the trust estate into court. Having asked and got judgment on that theory they are concluded thereby. Appellees' conduct in the premises was an election

of remedies. The election of remedies is held to be conclusive and it applies to pleadings and procedure in courts.

John v. Greist, 85 Ind. 503.
Mescall v. Tully, 91 Ind. 96.
Dawson v. Shirk, 102 Ind. 184, 188.
Chicago etc. Co. v. Bills, 104 Ind. 13.
Ikerd v. Beavers, 106 Ind. 580, 588.
Green v. Groovea, 109 Ind. 519.
Carr v. Haskett, 110 Ind. 152, 155.
Baker v. Lydlam, 118 Ind. 87.
Aetna etc. Co. v. Hildebrand, 137 Ind. 462.
State v. Scott, 171 Ind. 349.
Elliott's Gen. Prac. Secs. 945, 1013.
5 Lawson's Rights, Rem. and Pr. sec. 2498.

Point 7.

The nominal trustee joined with its creditor, the Fidelity Trust Company in its corporate capacity proper, as co-plaintiff in a cross-complaint to enforce a claim of the creditor against the trust estate in a cause where the trust estate was not sued—where the trust estate was without notice issued to it or served upon it as to the cross-complaint on which recovery was had. The nominal trustee could not sue itself and it did not sue itself nor the trust estate. The nominal trustee could not defend itself in its own action, nor the trust estate. The trustee is a judgment plaintiff here in a judgment in rem against the trust estate on issues tendered against the trust estate by the nominal trustee and as to which issues the trust estate never was sued. The judgment is void. Vide authorities supra.

1. Burns R. S. 1914, sec. 252.
Mitchell v. St. Mary et al., 148 Ind. 111, 115.
Marion Bond Co. v. Mexican etc. Co. 160 Ind., 558, 563.

811 Point 8.

Denial of due process of law and denial of the equal protection of the law may arise upon a judicial record as it may arise otherwise. In the instant case it arises upon a judicial record. The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities.

Scott v. McNeal, 154 U. S. 34-45; 38 Law Ed. 896, 901.
Forsythe v. Hammond, 142 Ind. 519; 30 L. R. A. 583.

Point 9.

It was a denial of due process and it was a denial of the equal protection of the law and it was the impairment of the obligation of a contract for the trial court without the trust estate having been sued and without any issue being tendered to that effect, to reform the trust deed so as to take from appellants the rights which they have never parted with and which they never had granted away, viz:

A. The power coupled with an interest in their behalf to protect in any lawful manner the trust as they had created it.

B. The power coupled with an interest in their behalf to protect the trust as they had created it, and which embraced the power retained in them as grantors to appoint a new trustee for cause; and limited any power of appointment by the court to the appointment of a receiver who should sequester the trust estate and hold it in custodia legis while the court was engaged with determining the rights of the parties under the trust agreement at the time the litigation began.

812 C. The power coupled with an interest in their behalf to protect the right of possession and the uses of the rents and profits of the trust estate pending the progressive execution of the trust.

D. The power coupled with an interest in their behalf, to enforce the obligation that time was of the essence of trust agreement.

E. The power coupled with an interest in their behalf to enforce the obligation of the trustee to do and perform as in the trust agreement provided for, and as the consideration for the trust agreement.

F. The power coupled with an interest in their behalf to enforce the obligation of the trustee to engage its fidelity to the performance of the trust.

G. The power coupled with an interest in their behalf to enforce the obligation of the trustee as a contractual consideration for the mutual covenants of the trust contract that the trust, with fidelity on the part of the trustee should be performed in the time, form and manner and upon the terms particularly stipulated and set forth in the memoranda creating the trust.

Point 10.

The court could no more take these vested rights from the grantors of the trust without a lawful and proper issue to reform for lawful and proper grounds the trust agreement, and without the trust being in court, than the legislature could have taken them upon its mere ipse dixit in the form of a pretended statute.

McClellan v. Coffin, 93 Ind. 463.

Conant v. National Bank, 121 Ind. 323.

Perkins v. Haywood, 124 Ind. 445, 450, 451.
Reynolds v. Louisville etc. R. Co. 143 Ind. 579, 614-634.
Stenzel v. Boyce, 143 Ind. 642, 646.
Love v. Turpie, 147 Ind. 652.
Harrison etc. Ass'n. v. Lackey, 149 Ind. 10, 14.
Indpls. etc. R. Co. v. Houlehan, 157 Ind. 494, 506.
Stewart v. Knight etc. Co. 166 Ind. 498.
Huber Mfg. Co. v. Wagner, 167 Ind. 98.
Harrison Tp. v. Addison, 176 Ind. 386, 396.

813 Point 11

"Testing the case by the principle 'that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts and under circumstances repelling all presumptions of fraud, imposition or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is were the appellants entitled to relief? To which we respond decidedly in the negative.' Mr. Justice Catron in Bank etc. v. Daniels, 12 Pet. 32, 56; L. Ed. 989, 998.

Upton v. Tribilcock, 91 U. S. 50; 23 Law Ed. 206.
Lamborn v. County Comrs. 97 U. S. 181 185; 24 L. Ed. 926-929.
Bond v. Coats, 16 Ind. 203.
Oiler v. Card, 23 Ind. 212, 219.
Town of Ligonier v. Ackerman, 14 Ind., 552, 568, 578.
Bennett v. Ford, 47 Ind. 264-269.
Hines v. Board, 93 Ind. 266.
Parker v. Bank, 59 Ind. App. 189, 192-4.

Point 12.

"The cestui que trust may bring a bill or petition for removal, and the court may remove the trustees from office and appoint others in their place when there has been bad conduct, or the trustee is unfit for his office, or to prevent a threatened breach of the trust or any danger to the trust fund."

Perry on Trustee, 5th Ed. Sec. 817.

Point 13.

"Proceedings for the removal of trustees and the appointment of others require some time, as trustees have the right to file answers to the charge against them and to a regular and full hearing; and as the cestui que trust are entitled to have the fund properly protected and managed in the meantime, the court may appoint receivers."

Perry on Trusts, 5th Ed. sec. 818.

Point 14.

"The cestui que trust is entitled to enforce the trust, not only against the trustee, but also against those who with notice, wrongfully claim under the trustee.

Perry on Trusts, 5th Ed. Secs. 821, 822.

Zimmerman v. Makepeace, 152 Ind. 199.

814 Point 15.

"The powers of trustees under deeds of trust, and of mortgagees under mortgage with power of sale, depend entirely upon the terms of the deeds. Such powers are created by, and exist in the deeds, and of course they exist in the terms in which they are created and in no others. They are to be exercised by the trustees in pais. They are wholly matters of convention and contract between the parties, and not of law of jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. Statutes in some states have regulated their execution, but such statutes do not create the powers themselves."

Perry on Trusts, 5th Ed. § 602*g*.

Point 16.

In the consideration of a court of equity the cestui que trust is actually seized of the freehold.

Croxall v. Sherard, 5 Wall. 268; 18 Law Ed. 572.

Proposition C. Second Error.

The appellees are in the dilemma of one who occupies a double position. (1) If their second amended counter claim is to be read as an answer it is to be read in the light of the complaint in which event all those items go out of the case which represent events following the filing of the complaint on October 30, 1912, the complaint reposing on the trust agreement and its repudiation by the trustee. (2) If their second amended counter claim is to be read not as an answer but as a cross-complaint, then the trust estate is not in court because the trustee could not sue itself on its own cause of action.

To sustain this proposition we offer the following points, viz:

815 Point. 1.

Nor can it be said that the payments made after the election of the trustee to repudiate the trust were made under duress because (1) there is no issue to that effect in this record and (2) because the duress, if any, could be confined only to the fear of tax sale or foreclosure of prior mortgages. The act of repudiation would estop the appellee from making such defense of payment under duress if

it was the duty of the trustee to protect the entire trust and not merely the trustee's interest therein and (2) it would be a wrongful and unlawful severance of the trustee's duties to the trust to admit that the trustee might make the payments to protect its own interests in the trust estate and at the same time abandon the protection of the interests of the cestui que trust against tax sale or foreclosure. Unless the payments were made to protect all the interests of everybody affected by the trust, the payments would be not only voluntary but wrongful. It is wrongful for a trustee to abandon the interests of cestuis que trust. The record shows that after the act of repudiation on October 28, 1912 (Tr. p. 385) the appellees set about to acquire title to the entire trust estate as upon foreclosure. It is the law of this case as settled by the former opinion of this court, that those foreclosure proceedings were wrongful and unlawful. While that wrongful and unlawful conduct was being pursued by the appellees they claim to have made the certain payments including the purchase of the American Central, etc. mortgage. Upon the acquisition of that mortgage the Fidelity Trust Company at once proceeded to foreclose that mortgage and to that effect file its complaint on May 15, 1914, against these appellants, who were cestuis que trust in the trust agreement (Tr. p. 736). Voluntary payments cannot be recovered back.

See cases Point 9 supra.

16

Point 2.

One who acts in aid of his own wrong not only denies himself the right to recover voluntary payments he made in advancing his unlawful purposes, but also being a wrongdoer, he fails to come into equity with clean hands and cannot enforce therefor subrogation, nor sue in the right of one whose interest the wrongdoer acquired.

Wilkinson v. Babbitt, 1 Dillon C. C. 207; 29 Fed. Cas. 17, 668.

Point 3.

"Was it ever known that a fraudulent purchaser of property, when deprived of its possession could recover for his repairs or improvements or for incumbrances lifted by him whilst in possession? If such a case can be found in the books we have not been referred to it. Whatever a man does to benefit an estate under such circumstances, he does in his own wrong. He cannot get relief by coming into equity."

Railroad Co. v. Soutter, 13 Wall., 517, 523.

Point 4.

It is settled as the law of this case that the appellees' foreclosure of the trust deed as a mortgage was wrongful and unlawful; the sale acquired under the decree of foreclosure was consequently wrongful and unlawful; every step taken and every act done in aid

of the wrongful repudiation and foreclosure was ultra vires the trust and was wrongful and unlawful. Rooker v. Fidelity Trust Co., 185 Ind. 172.

Point 5.

"The doctrine of subrogation applies only to lawful and meritorious transactions. It is a doctrine which prevails only in equity, and it would be absurd to say if the trans- were illegal and void, and could not be upheld for that reason, that these mortgages, 817 which, if paid for at all by the company, were based upon such illegal transactions * * * could be enforced by them." Farmers Loan etc. Co. v. Carroll, 5 Barb. 613, 660.

Point 6.

"The law cares very little what a fraudulent party's losses may be and cares nothing for his sake."

Guckenheimer v. Angevine, 81 N. Y. 294.

Point 7.

"If Titus write an oration or a poem on a parchment which he obtained wrongfully, the oration or the poem will go with the parchment, even though written by Titus."

Justinian, De Scripta.

Point 8.

"Our law, like the Roman law, treats those who expend money or labor upon property wrongfully taken by them, as volunteer servants of the owner. So far the authorities, both English and American, seem to be harmonious, and in accord with the civil law." Year Book, 5 Hen. VII, Folio 15; 2 Bl. Com. 404; 2 Kent Com. 363; Betts v. Lee, 5 Johns. 348; Baker v. Wheeler, 8 Wend. 505; Silsbury v. McCoon, 3 N. Y. 379; Guckenheimer v. Angevine, 81 N. Y. 397; Baker v. Hart, 52 Hun. 365.

Point 9.

To a party whose title originated in fraud or otherwise wrongfully, no compensation for improvements and the discharge of incumbrances, ever is allowed.

Morrison v. Robinson, 31 Pa. 456.
Van Horne v. Fonds, 5 Johns Ch. 388, 416.
Russell v. Blake, 2 Pick. 505.
McKim v. Moody, 1 Rand. (Va.) 58.
Morris v. Terrill, 2 Rand. (Va.) 6.

Point 10.

There is no case "decided in England, Ireland or the United States, grounded upon common law principles, declaring an
818 occupant of land, without a special contract, is entitled to payment for his improvements as against the true owners, when the latter have not been guilty of fraud in concealing the title." Heron, Hist. Jurisprudence, p. 715.

Point 11.

Certainly the appellants, unless they did so as forced trustees, and in their right as cestuis que trust, did not bring the trust estate into court in this suit because, on the appellees' final trial court theory, which they procured the trial court to adopt, the appellants were by the judgment of the court held to be without an interest and were enjoined from asserting an interest. Certainly the nominal trustee joining with its creditor did not bring the trust estate into court in this cause because the nominal trustee could not sue itself. Upon the record and judgment therefore we have the trust estate, in its absence from court mulcted in a large sum which upon the authorities supra was composed of unlawful claims on the part of the nominal trustee and its co-appellee and counter claimant.

Proposition D. Second Error.

The act of March 15, 1913 (Acts 1913, p. 850) as amended by the Act of March 5, 1915 (Acts 1915, p. 123; 1 Burns R. S. 343 A, impairs the obligation of contracts by permitting the pleader to substitute for the terms of the contract his own conclusions as to the terms of the contract and the statute forces a joinder of issue for the purposes of trial upon the pleader's conclusions rather than upon the terms of the contract.

To sustain Proposition D, we offer the following points, viz:

Point 1.

The obligation of a contract includes both the specific terms of the contract and the laws which attend them and as thus
819 constituted the obligation of a contract, is guaranteed by the constitution of the United States, which is the supreme law of the land. Art. 1, sec. 10 Const. U. S. Art. VI. Const. U. S.

Point 2.

To guarantee the correct and judicial interpretation the obligation of the contract, which is the basis of this action, the constitution of the state clothes the contract with the right of "due process of law" and the legislature made it imperative that the affected contract should be produced in court and exhibited with the pleadings. Art. 1, sec. 12, Const. Ind. 1 Burns R. S. 368.

Point 3.

A contract exhibited with a pleading should control the averments of the pleading.

Harrison Co. v. Lackey, 149 Ind. 10.
Stewart v. Knight & Jillson Co. 166 Ind. 498.
Huber Mfg. Co. v. Wagner, 167 Ind. 98.

Point 4.

Parol evidence should not be admitted to vary the terms of a written instrument.

Rooker v. Fidelity Trust Co., 185 Ind. 172.

Point 5.

When an exhibit is contained in a special finding, the exhibit should control the terms of the special finding and the judgment should follow the findings.

1 Burns R. S. 577.
Smith v. Brand, 64 Ind. 427, 430.
Buchanan v. Berkshire etc. Co. 96 Ind. 535.
Conant v. Bank, 121 Ind. 323.
Indianapolis etc. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. R. Co. 143 Ind. 579, 611-634
Lowe v. Turpie, 147 Ind. 652.

Point 6.

In an action on a contract the pleading should disclose a breach of the contract whereby the party asserting the right
820 was aggrieved, because the courts are only open that "every man, for injury done him in his person, property or reputation shall have remedy by due course of law."

Const. Ind. Art. 1, sec. 12.
Gallup v. Schmidt, 154 Ind. 196, 202.

Point 7.

The Act of March 15, 1913, (Acts 1913, p. 850) as amended by the act of March 5, 1915 (Acts 1915, p. 123; 1 Burns R. S. 343) specifically authorizes conclusions to be pleaded in the place and stead of facts, and required issues to be joined on such conclusions. Nor is it a cure of the evil in the law that the statute makes it possible to require the complaint to be made more specific, etc., because the right of the pleader to set forth conclusions authorizes the court to exercise a discretion in respect of those conclusions which may be in contravention of the contract. In the instance case the appellees' joint cross complaint pleaded the false conclusions that upon certain facts states, which included an exhibit of the trust contract, that there had been performances by appellees; default by appellants and

therefore that there was a cause of action in the appellees. These false conclusions of the pleader stood despite motions to strike out (Ante 159–163) to make more certain and specific (Ante 163–167); also demurrers (Ante 167–182). These false conclusions of the pleader entered into the special findings as a fact and they stood, notwithstanding the presence of the trust agreement, despite motions of appellants for judgment in their favor on the special findings (Ante 182–183). These false conclusions of the pleader entered into the conclusions of law and they stood despite the exceptions of these appellants, as plaintiffs, to the conclusions of law (Ante 183–184). These false conclusions of the pleader entered into the judgment and they stood despite the motions to modify the judgment. (Ante 184–193). These false conclusions of the pleader became finally conclusive of the rights of the parties despite the motions of appellants, as plaintiffs, for a new trial of the cause. (Ante 193–217). The fatal vice of the statute is that it removes the obligation from the terms of the contract and plans it in the judicial discretion despite the principle that courts do not create contracts but only enforce them. The statute therefore imposes on appellants as a vital element of this appeal, the duty to determine the accuracy of the court's action in respect of the conclusions pleaded, rather than the accuracy of the court's action in respect of the terms of the affected contracts.

McClellan v. Coffin, 93 Ind. 463.
Saltner v. Tappy, 55 Ind. 107.
Stewart v. Knight etc. Co. 167 Ind. 98.
Conant v. Bank, 121 Ind. 323.
Indianapolis etc. R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. Co. 143 Ind. 579, 544–634.
Stenzel v. Boyce, 143 Ind. 642, 646.
Globe etc. Co. v. Reid, 19 Ind. App. 203, 212.
Harrison Building etc. Co. v. Lackey, 149 Ind. 10, 14.
Lowe v. Turpie, 147 Ind. 652.
Perkins v. Hayward, 124 Ind. 445, 450–451.
Harrison Tp. v. Addison, 175 Ind. 386, 396.

Point 8.

After the appellees elected to stand upon the exhibits pleaded, as they did stand, unless the countervailing statute could and did substitute the pleader's conclusions in the place and stead of the obligation of the contract, then no evidence should have been admissible which would change, alter, or vary the terms of the instruments pleaded, and by those instruments the appellees must now stand or fall unless the statute defeats the contracts.

Conant v. Bank, 121 Ind. 323.
Indianapolis etc. R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. R. Co., 143 Ind. 579, 614–634.
Rooker v. Fidelity Trust Company, 182 Ind. 175.

Point 9.

822 The findings of maturity, default and the right of judgment are not sustained by the instruments pleaded and therefore should be disregarded as being outside of the issues, unless the conclusions of the pleader are, by the terms of the statute, made to displace the terms of the contract. In the event the conclusions of the pleader displaced the terms of the contract then we were to try the cause on the issue of what the pleader said the contract was rather than on the issue of what the contract by its own terms declared itself to be according to the fixed rules of judicial interpretation and construction.

Cruzan v. Smith, 41 Ind. 288, 295.
Boardman v. Griffin, 52 Ind. 101.
Naltner v. Tappy, 55 Ind. 105.
Thomas v. Dale, 86 Ind. 435.
Brown v. Will, 103 Ind. 71.
Willis v. Crowder, 134 Ind. 515.
Citizens Bank v. Judy, 146 Ind. 322.
Lowe v. Turpie, 147 Ind. 652.
Reynolds v. Louisville etc. Co. 143 Ind. 576, 621.
Harrison etc. Co. v. Lackey, 149 Ind. 10, 14.
Talbott v. English, 156 Ind. 299, 315.
Indianapolis etc. R. Co. v. Houlihan, 157 Ind. 494, 506.
Stewart v. Knight etc. Co. 166 Ind. 498.
Huber Mfg. Co. v. Wagner, 167 Ind. 98.

Point 10.

As the case stood the appellants had executed with the Fidelity Trust Company as trustee, the trust agreement. The terms of the agreement were its consideration. The agreement was by its terms to be performed in pais. There was no obligation imposed on the appellants but they had rights which commanded protection. Having no obligation to perform the appellees had no obligation which they could default. Having no capacity for default the appellants were without capacity because of default, to create the maturity of any obligation on their part to be performed or to create any right in the appellees. Because of this situation the appellees directed their various motions and demurrers to the counterclaim. These motions and demurrers had elements of similarity. But the court accepted what the appellees said about the trust agreement
823 rather than what the trust agreement said about itself; and thus the cause came to be tried upon the conclusions of the pleader rather than upon the terms of the contract as given in its own words.

Ante, Motions to Strike Out, 159-163.
Ante, Motion to Make More Specific, 163, 167.
Ante, Demurrers with Memoranda, 167, 182.

Point 11.

A case tried upon a complaint which does not state a cause of action cannot result in a special finding which will be sufficient, because a special finding can be no broader than the complaint under the familiar rule that a special finding must be within the issues.

Davis v. Franklin, 25 Ind. 407, 408.
Kealing v. Vansickle, 74 Ind. 529, 535.
Perkins v. Hayward, 124 Ind. 445, 450-1.
Durflinger v. Baker, 149 Ind. 375, 378.
Talbott v. English, 156 Ind. 299, 315.
Cook v. Board, 175 Ind. 215, 224.
Harrison Tp. v. Addison, 176 Ind. 386, 396.

Point 12.

After the appellee elected to stand upon the exhibits pleaded, and it was an election so to stand when the appellee prevailed upon the court to overrule the appellant's demurrers and motions to make more specific, etc. then no evidence should nor would be admissible which would change, alter or vary the instruments pleaded, and by those instruments the appellee must now stand or fall, unless the statute (1 Burns R. S. 343 prevails to allow the obligation of the contract, which is its consideration, to be impaired by the judicial imposition of "conclusions" to which as terms of the contract the affected parties never have given their consent.

Conant v. Bank, 121 Ind. 323.
Indianapolis R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. R. Co. 143 Ind. 579, 611-34.

524 Point 13.

The instruments at issue are set out ipsissimus verbis in the special findings and they should have controlled it as they should have and would have controlled the counter claim, except as the statute (1 Burns R. S. 343 A) impaired the obligation of the contract by destroying its consideration. The obligation of a contract, within the meaning of the constitutional provision against impairment, depends upon its terms and the means which the law in existence at the time affords for its enforcement. Validity and remedy are both parts of the obligation and are guaranteed by the constitution against impairment. When the court in this case, adopting the conclusions of the pleader pursuing the statute (1 Burns R. S. 343 A), held that the appellants were without right to enforce the performance of the trust agreement, then and thereby the court held that there was no person competent and qualified to enforce the performance of the contract. This constituted impairment and the statute supra which pretended to authorize such procedure fell within the inhibition of the constitution.

McCracken v. Hayward, 2 How. 608; 11 Law Ed. 397.
Walker v. Whitehead, 16 Wall. 314; 21 Law Ed. 357.
Murray v. Charleston, 96 U. S. 432; 24 Law Ed. 760.

Point 14.

The independence of the judiciary from legislative control in the matter of interpretation comprises a part of the obligation of a contract. While it may be admitted that the legislature may prescribe statutory definitions for the purpose of a statutory right—for example the legislature may define a statutory mechanic's lien—but the legislature, nevertheless, is without power to tell the judiciary the meaning of words in a contract, and, likewise, the legislature
825 is without power to authorize any other person to tell the judiciary the meaning of words. To illustrate the many bearings which this principle affecting the independence of the jury has in the instant case the statute authorized the pleader to state as a conclusion binding on the court that the appellee had performed "all conditions of said contracts on its part to be performed." (Ante, p. 79); also, "That said cross complaint has fully and duly performed all of the conditions on its part to be by it performed." (Ante, p. 95.)

Point 15.

If the legislature can require courts to accept a pleader's conclusions in lieu of facts, then the legislature can require courts to give an effect to contracts which will defeat the intentions of the parties who made the contracts. If the legislature can require the courts to defeat the expressed intention of the parties to a contract, then the legislature can require courts to change and modify contracts. If the legislature can require courts to change and modify contracts then the legislature can require the courts to deny altogether the right to contract. The inviolability of contract clauses of the constitution restrains such power in the legislature.

McClelland v. Coffin, 93 Ind. 465.

Point 16.

The trend of the law is to allow the utmost liberty in contracting. It repeatedly has been held that parties may stipulate that the law of a state or country other than the one wherein the contract is made, shall govern its interpretation and remedy both as to
826 the rights and duties of the parties on the one hand and as to their remedies in case of a breach on the other hand. The law of the contract is a part of its obligation.

McAllister v. Smith, 17 Ill. 328, 334.

Union Nat'l Bank v. Chapman, 169 N. Y. 538, 545.

Grand v. Livingston, 4 App. Div. 589, 593, 596, affirmed 158 N. Y. 688.

Dike v. Erie Ry. Co., 41 N. Y. 113, 116.

Le Breton v. Miles, 8 Paige 261.

Green v. Poole, I. R. 5, Q. B. D. 272.

Cohen's Commercial Arbitration and the Law 16, 217.

Liverpool etc. Co. v. Phœnix Ins. Co. 129 U. S. 397, 445; 32 Law Ed. 788, 798.
Cochlan v. So. Carolina R. Co. 142 U. S. 101; 35 Law Ed. 951, 954.
Pinney v. Nelson. 183 U. S. 146; 46 Law Ed. 125.

Point 17.

Parties may by stipulation waive their right to appeal.
Townsend v. Masterson. 15 N. Y. 587.
Ogdenburgh etc. R. Co. v. V. etc. R. Co. 63 N. Y. 176.
Godfrey v. Moser, 66 N. Y. 250.
Riggs v. C. etc. Ind. Co. 125 N. Y. 7; 10 L. R. A. 684; 21 Am. St. Rep. 716.
Palmer v. Lavers. 218 Mass. 286; 105 N. E. 1000.
Hoste v. Dalton, 137 Mich. 522.
Watson v. Wetter. 91 Pa. 385.

Point 18.

There is strong authority for the legal proposition that parties may select the courts in which the case is to be tried in the event of controversy. Judge Parker in La Greve v. Aetna etc. Co., 81 Hun. 28, 30, said: "The suggestion that the court should resent this attempt to oust it of jurisdiction is unworthy of extended notice."

Point 19.

Jessel. M. R. in Printing etc. Co. v. Sampson. L. R. 19 Eq. 462. 465, said: * * * if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and
827 that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

Point 20.

Judge Earl in re New York etc. R. Co., 98 N. Y. 447, 453, said: "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties which not only binds them, but which the courts are bound to enforce."

Point 21.

The parties to a contract may require the commencement of an action within a period shorter than prescribed by the statute of limitations.
Erie etc. R. Co. v. Stone, 98 N. Y. 447, 453.
Ames v. New York etc. Ins. Co. 14 N. Y. 253, 262.
Ripley v. Aetna Ins. Co. 30 N. Y. 136, 163.
Peach v. New York etc. Co., 30 N. Y. 546.

Mayor etc. v. Hamilton etc. Co. 39 N. Y. 45.
Williams v. Fire Ass'n etc. (N. Y.) 119 App. Div. 573.
Riddlesbarger v. Hartford Ins. Co. 7 Wall. 386, and cases cited.
Fullam v. New York etc. Ins. Co. 7 Gray 61.

Point 22.

The parties to a contract may limit their liability for negligence.
Anderson v. Erie R. Co. (N. Y.) 171 App. Div. 687.

Point 23.

They may settle controversies on terms which do not affect a general release of liability.
Parry Mfg. Co. v. Crull, 56 Ind. App. 77.

Point 24.

The parties to a contract may provide an exclusive form of remedy which the courts will enforce.
Hickman v. Sawyer, 216 Fed. 281 and cases cited.

828 Point 25.

In the instant case the parties agreed upon a ritual of procedure. Mrs. Rooker was undertaking to liquidate her estate. Time was of the essence of the contract and the prescribed method was its consideration. Instead of performing the trust agreement the appellees devoted many years of earnest endeavor to acquiring, and they did acquire by proceedings adversary to the trust, the legal title to the trust property. All these principles of the trust agreement became the settled law of this case on the former appeal, and the facts appear uncontroverted in this record. Notwithstanding this situation the statute (1 Burns 343 A) allowed the appellees to destroy the law of the case, to destroy the obligations of the contract and to disregard the unlawful conduct in pais of the appellees, by their making the averment of a conclusion of full and due performance, obligatory on the court to the exclusion of every fact and of every principle of jurisprudence, including the settled law of the case as fixed on the former appeal. This result, we contend, impaired the obligation of the contract.

Point 26.

The legislature can neither perform judicial functions nor enforce them upon the people through the medium of a subordinate judiciary.
Cooley's Const. Lim. (6th Ed.) 113-115.

Point 27.

This rule is illustrated in fact by the Constitution of Indiana which provides in its bill of rights: "All courts shall be open; and every man, for injury done him in his person, property or reputation shall have remedy by due course of law. At the time the
529 affected trust agreements were written it became, as it is of course now, an engagement in the obligation that "due course of law" should attend the remedies sought in an action on the contract. The legislature therefore could not cut down or limit the "due process of law." Any function in that respect was judicial and not legislative.

Const. Ind. Art. 1, sec. 12.

Point 28.

Where the constitution imposes a duty or protects a right the legislature can neither enlarge the duty nor impair the right. If that could be done, then the legislature could by statute amend the constitution.

Ex parte France, 176 Ind. 72.

Curless v. Watson, 180 Ind. 86.

Point 29.

This act of the general assembly is a species of recall of judicial opinion.

Domestic Block Coal Co. v. De Arney, 179 Ind. 592.

Point 30.

The recall of judicial opinion is not authorized in Indiana. It exists in England because the House of Lords is both a part of the Parliament and the supreme judicial tribunal. It has, therefore, both political and legislative power on the one hand and judicial power on the other. At one time, if not now, the royal prerogative embraced the right of recall of judicial opinion. This power was exercised sparingly and its utmost notable instance, perhaps, was when the attempt of Lord Coke to destroy the lex Mercatonia was challenged by Lord Mansfield who sought to preserve the lex Mercatoria as in the equity jurisprudence. The royal prerogative sustained Lord Mansfield and thereafter instruments not under
530 seal, as notes and bills of exchange, were freely admitted to a place as the basis of suits for judicial redress. Thus again the statute of 4 Anne, Chap 16, sec. 12, "An act for the Amendment of the law and the better advancement of justice," was employed to prevent the expansion of Lord Holt's opinion in Clarke v. Mundall (Martin?) 1 Salk. 124 S. C., to the effect that on the date of maturity of a bill there could be no accord and satisfaction if payment were made in money of less value from the face of the note, though such

accord and satisfaction might be accomplished if the payment were made with a horse or any other subject of property else than money. (Cranch: "Promissory notes before and after Lord Holt.) In the Federal government where the congress is given control over specific property an act of congress may recall a judicial opinion which affects such property. There the recall traces not to the power of the congress over jurisdiction of the judiciary as the rule is in England, but to the power of the congress over the subject of that judicial opinion.

State of Pennsylvania v. Wheeling etc. Co. 18 How. 421.

Point 31.

But the senate is without the judicial power possessed relatively by the House of Lords.

Kilbourn v. Thompson, 103 U. S. 166; 26 Law Ed. 377.

Point 32.

Under our constitution the legislature may define a court's jurisdiction of causes. But that power does not involve the independence of the judiciary once created to employ the common language of the people as that language is spoken, nor to direct the interpretation and construction of contracts. The rule is that where power is lodged to hear and determine the authority thus created will
831 not be abridged by a restriction in the use of words so defined as to transgress the meaning of the common language of the people.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294.
Galveston etc. v. Texas, 210 U. S. 217, 227.
St. Louis etc. Co. v. Arkansas, 235 U. S. 350, 362.
Kansas City v. Kansas, 240 U. S. 227, 231.
Mountain etc. v. Washington, 243 U. S. 219.

Point 33.

In Indiana the judicial and the legislative powers are segregated by Art. III of the Constitution. The legislature clearly is without power to impose terms or conditions upon the judicial interpretation and determination of contracts, and in so far as the act assumes to bind a court by the conclusions of a pleader in the interpretation of a contract the act is in conflict with both the Federal Constitution as to the due process clause, the equal protection of the laws clause, the contract clause and it contravenes also the Constitution of Indiana, Art. III, and sec. 12 of Art. I."

And appellants say that the Supreme Court of Indiana denied to appellants and to each of them a hearing and consideration of said Federal questions on the sole ground that the statement of them is confused with argument, whereas the Supreme Court of the United States has declared the rule to be the Federal question is presented if it be distinctly made at the proper time.

Wherefore appellants and each of them pray that there be granted to them a rehearing of this cause and that upon such rehearing the judgment of Hamilton Circuit Court be in all things reversed, and they pray for all proper relief.

(Signed) WILLIAM V. ROOKER,
Attorney for Appellants.

832 William V. Rooker, being first duly sworn says that he is one of the appellants in the cause above entitled and that the facts in the premises lie particularly within his knowledge, rather than within the knowledge of his co-appellant, and therefore he makes this affidavit for both appellants, and says that the facts stated in the foregoing petition are true except as they are stated upon information and belief and therein affiant believes them to be true.

And further affiant saith not.

(Signed) WILLIAM V. ROOKER.

Subscribed and sworn to before me this 11th day of August, 1921. Witness my hand and official seal.

[SEAL.] (Signed) PATRICK J. LYNCH,
Clerk.

(Endorsed) No. 23598. In the Supreme Court of Indiana. Dora E. Rooker, et al., Appellants v. Fidelity Trust Co. et al., Appellees. Appellants' Petition for rehearing. William V. Rooker, Attorney for Appellants. Filed Aug. 11, 1921. Patrick J. Lynch, Clerk.

833 And afterwards, to wit: On the 8th day of September 1921, being the 94th Judicial day of the May Term, 1921, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellee by counsel and files its brief (8) on appellants' petition for rehearing in the words and figures following:

And afterwards, to wit: On the 12th day of October, 1921, being the 123rd Judicial day of the May term, 1921, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the parties, and the Court being sufficiently advised in the premises, denies the petition for rehearing heretofore filed herein by appellants and orders judgment for the appellee herein.

And afterwards, to wit: On the 14th day of December, 1921, being the 15th Judicial day of the November Term, 1921, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the appellants by counsel, and file in the office of the Clerk of the Supreme Court, their petition for the allowance of a writ of error, said petition, and the allowance thereof being hereto next below attached, and being as follows:

834 In the Supreme Court of Indiana, November Term, A. D. 1921.

No. 23598.

DORA E. ROOKER, WILLIAM V. ROOKER, Petitioners,

vs.

FIDELITY TRUST COMPANY, in Its Corporate Capacity Proper, Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Respondents.

Petition for Writ of Error.

To the Honorable the Supreme Court of Indiana:

Dora E. Rooker and William V. Rooker, appellants in the above-entitled cause, show by this their petition to this Honorable Court that in the records, proceedings and decisions in the Supreme Court of Indiana — in which a decision could be had in this suit, manifest errors have occurred, greatly to the prejudice and damage of said Dora E. Rooker and William V. Rooker.

That there arise upon the record in said cause certain federal questions, to-wit:

835 1. The Indiana Civil Practice Act of March 15, 1913, as amended and approved March 5, 1915, is a state law impairing the obligation of contracts, and is in contravention of Article I Section 10, of the Constitution of the United States. The evil of this act reposes in the fact that it admits the substitution of "conclusions" in the place of facts in pleadings, evidence, verdicts and judgments of courts. The effect of the statute is that contracts can be declared upon as meaning what they do not mean and thereby that causes can be tried upon false issues, to the injury of litigants.

2. The judgment of the Hamilton Circuit Court of Indiana deprives these petitioners of their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. This quality of the court's judgment traces to the practice act of March 15, 1913, as amended and approved March 5, 1915, which not only impairs the obligation of the contract but has the further vice that it strikes down the precedents in procedure and allows the court to act arbitrarily and without the essentials of jurisdiction, and to hear and determine cases upon false issues.

3. The judgment of the Supreme Court of Indiana deprives these petitioners of their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. This quality of the court's judgment traces not only to the vices of the Practice Act of March 15, 1913, as amended
836 March 5, 1915, as stated in points 1 and 2 supra, but the judgment of the Supreme Court has the additional vice that

it was made coram non judice by the disqualification of the Court, one of the members of which, Judge Louis B. Ewbank, had a large and vital interest and duty, both personal and fiduciary, in the precedents to be established by this case, and these interests and duties of Judge Ewbank were hostile to and in derogation of the rights of these petitioners in this case. These disqualifying interests and duties of said Ewbank, and the method of their disclosure to petitioners, are recited in the assignment of errors and in the petition for a writ of certiorari as they relate to the ruling on the petition for a rehearing.

4. The judgment of the Hamilton Circuit Court of Indiana denies to these petitioners the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States quoad hoc the Court holds that these petitioners because of their trust deed, creating the trust and lodging the legal title of the property in the trustee for the purposes of the trust, thereby parted with all their interest in the affected property and therefore have no standing in court to protect their trust estate as against the misfeasance and malfeasance of the malevolent trustee, who had repudiated the trust and renounced its obligations thereunder. The petitioners contend that the cestuis que trust are the equitable owners of the affected property; that this interest of the
837 cestuis que trust continues until the final determination of the trust and that where the trust agreement calls for performance in pais to determine the trust that judicial determination thereof cannot be substituted for that which the parties agreed upon as the consideration for and obligation of their contract.

5. The judgment of the Supreme Court of Indiana denies to these petitioners the equal protection of the laws, in contravention of the Fourteenth Amendment of the Constitution of the United States. The merit of this point and its determination involves collectively those issues and matters which are severally stated in points 1, 2, 3, and 4, supra.

6. The judgment of the Supreme Court of Indiana denies to these petitioners due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment of the Constitution of the United States, in holding that these petitioners should be denied the remedies and processes of the law because to apply them in behalf of petitioners would work to the great harm and loss of appellee trust company, and to the unearned and undeserved large money benefits to appellants.

That each of these federal questions fully appears in the records and proceedings in this case and in the rulings exhibited in the assignment of errors filed herewith.

Wherefore, petitioners pray that a writ of error be allowed, and that a transcript of the record, proceedings and judgment and the papers upon which said decree was rendered, duly authenti-
838 cated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of such court

in such cases made and provided, and that the same may be by this Honorable Court inspected and corrected in accordance with law and justice.

CHRISTIAN P. WALTZ,
WILLIAM V. ROOKER,
Attorneys for Petitioners.

Dec. 14th, 1921.

Allowed,

LOUIS B. EWBANK,
Chief Justice.

839 [Endorsed:] Original. In the Supreme Court of Indiana. No. 23598. November Term, A. D. 1921. Dora E. Rooker, William V. Rooker, Petitioners, v. Fidelity Trust Company, in its Corporate Capacity Proper, Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Respondents. Petition for Writ of Error. Filed Dec. 14, 1921. Patrick J. Lynch, Clerk.

840 And on the same day, the following further pleas and proceedings were had in said court, in said cause:

Come now the appellants, by counsel, and file an assignment of errors in the Supreme Court of the United States, on the writ of error herein, said assignment of error being hereto next below attached, and being as follows:

841 In the Supreme Court of Indiana, November Term, A. D. 1921.

No. 23598.

DORA E. ROOKER, WILLIAM V. ROOKER, Appellants,

vs.

FIDELITY TRUST COMPANY, in Its Corporate Capacity Proper; Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Appellees.

Assignment of Errors with Petition for Writ of Error.

Dora E. Rooker and William V. Rooker, appellants in the cause above entitled, in connection with their petition for a writ of error herein to remove this cause to the Supreme Court of the United States, make this their assignment of errors against the Fidelity Trust Company, in its corporate capacity proper, and the Fidelity Trust Company as Trustee of the Estate of Dora E. Rooker, appellees, and appellants say: That there is manifest error in the record, proceedings and judgment of the Supreme Court of Indiana in this action, in each of the particulars following, to-wit:

842 1. The Hamilton Circuit Court of Indiana erred in overruling the motion of these plaintiffs in error to strike out the record amended counter claims and cross complaints of the defendants in error, which said motions in Circuit Court were to the effect that said second amended counter claim was vague, indefinite and uncertain and tendered no issue; that in the nature of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of a quantum valebat with valuations as fixed by the said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of a quantum meruit founded upon acts done by the said defendant to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by said defendant to the damage of said trust estate, and which said excess in value of benefits over damage the said trust estate has accepted and appropriated to its own use, benefit and advantage; that said second amended counter claim averred facts inconsistent with and contra-
843 dictory of the statement therein "that said cross complainant has fully and duly performed all of the conditions on its part to be by it performed" and that because of such inconsistencies and contradictions, the said averment was nullified and destroyed, to-wit, the averment "that said cross complainant has fully and duly performed all of the conditions on its part to be by it performed" and that in the premises there was no issue tendered by said second amended counter claim that said defendant was entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendant of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendant upon said counter claim; that said second amended counter claim averred no facts in excuse of the failure on defendants' part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendant was entitled herein to employ said trust agreement to fix the value, as upon quantum meruit, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement, and plaintiffs said that in the premises there was no issue tendered by said second amended counter claim that the said defendant was entitled to any recovery whatsoever as upon an issue the quantum meruit against these plaintiffs in favor of said defendant upon said counter claim; that said second amended
844 counter claim averred no facts founded upon acts done by said defendant to the credit, use, benefit and advantage of

the said trust estate in the aggregate exceeding in value the damages suffered and sustained by said trust estate because of any failure, omission or wrong done by the said defendant to the damage of said trust estate and which said excess in value of benefits over damages the said trust estate had accepted and appropriated to its own use, benefit and advantage; that upon the facts in the premises said second amended counter claim tendered no issue whatsoever in favor of defendant and was useless and could accomplish no proper and lawful purpose in this cause and was a needless encumbrance of the records and should be stricken from the files herein.

2. The Supreme Court of Indiana erred in affirming the action of the Hamilton Circuit Court of Indiana in overruling the motions of these plaintiffs in error to strike out the second amended counter claim and cross-complaint of the defendants in error which motions included the grounds that on account of the former decision of the Supreme Court of Indiana in this cause and the exhibits attached to said cross-complaint no sufficient cross-complaint or counter claim could have been written singly by said trustee or jointly by said trustee and another founded upon and to secure the further performance by said trustee of the said trust deed, as an executory contract, exhibited with and made a part of said second amended counter claim.

845 3. The Hamilton Circuit Court of Indiana erred in overruling the demurrers of the plaintiffs in error to the several second amended counter claims and cross complaints of the defendants in error, for want of sufficient facts to constitute a cause of action, which said demurrers were to the effect that in the nature of the action said counter claims should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of quantum meruit with valuations as fixed by the said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of quantum valebat founded upon facts done by the said defendant to the credit use, benefit and advantage of said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by said defendant to the damage of said trust estate, and which said excess in value of benefits over damages said trust estate has accepted and appropriated to its own use, benefit and advantage; that said second amended counter claim averred facts inconsistent with and contradictory of the statement therein "that said cross complain-
846 ant has fully and duly performed all of the conditions on its part to be by it performed" and that because of such inconsistencies and contradictions the said averment is nullified and de-

stroyed, to-wit, the averment "that said cross complainant has fully and duly performed all of the conditions on its part to be by it performed" and that in the premises there was no issue tendered by the said second amended counter claim that the said defendant was entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendants of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendant upon said counter-claim; that said second amended counter-claim averred no fact in excuse of the failure on the defendant's part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendant was entitled herein to employ said trust agreement to fix the value as upon quantum merut of any act or acts done or claimed to have been done by said defendants under and by virtue of said trust agreement, and plaintiff said that in the premises there was no issue tendered by said second amended counter-claim. That the defendants were entitled to no recovery whatsoever as upon an issue of the quantum valebat against these plaintiffs in favor of said defendants upon said counter-claim; that said second amended counter-claim averred no fact founded upon acts done by said defendants to the credit, use, benefit and ad-
847 vantage of said trust estate in the aggregate exceeding in value the damage suffered and sustained by said trust estate because of any failure, omission or wrong done by the said defendants to the damage of said trust estate, and which said excess in view of benefits and other damages the said trust estate had accepted and appropriated to its own use, benefit and advantage.

4. The Supreme Court of Indiana erred in affirming the action of the Hamilton Circuit Court of Indiana, in overruling the demurrers of the plaintiffs in error to the several second amended counter-claims and cross-complaints of the defendants in error for want of sufficient facts to constitute a cause of action, and upon the ground that plaintiffs in error claimed that the appellee trust company could not in any event by counter-claim sue the appellants on the subject matter of the trust estate on the facts set up in the counter-claims for the reason that the counter-claims were not relevant or germane to the complaint. And upon the further grounds that the plaintiffs in error claimed by their demurrers that the defendants in error were guilty of wrongful management of the trust property and sought to acquire title to it by wrongdoing and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost and it had no right to recover the sums of money expended by it for the use and benefit of the appellants; and by holding that the doctrine of election of remedies had no application to the circumstances of this case. For to
848 apply it here would work to the great harm and loss of the appellee trust company and the unearned and undeserved large money benefits to appellants, and that in fact the doctrine of election of remedies did not prevail unless two remedies were avail-

able, and that two remedies did not exist in favor of the defendants in error in this case.

5. The Hamilton Circuit Court of Indiana erred in overruling the demurrers of the plaintiffs in error to the joint second amended counter-claim and cross-complaint of the defendants in error for the reasons:

(1) That several causes of action had been improperly joined;

(2) That the facts stated in said counter-claims were not sufficient to constitute a joint cause of action in said defendants, and

(3) That the facts stated in said counter-claims were not sufficient to constitute a joint cause of defense; that said demurrers were to the effect that the exhibits filed with said counter-claim, which exhibits controlled the averments of said counter-claim, disclosed upon their faces the existence of two separate and distinct interests, estates, capacities and powers which as to each other were contradictory and adverse in the defendants, the Fidelity Trust Company on the one hand as trustee and the Fidelity Trust Company in its corporate capacity proper on the other hand, viz:

(1) Certain interests, estate, capacities and powers alleged to have been acquired and owned and held by said Fidelity Trust
849 Company ex-officio as trustee for each and all of these plaintiffs and of which interests and estates these plaintiffs were the equitable owners, subject only to such rights in the premises as said trustee might have under color or by virtue of its office, and of which said capacities and powers these plaintiffs were the grantors, all as more particularly set forth in two certain deeds of conveyance and one certain trust agreement executed in writing and concurrently on the 11th day of October, 1909, and which said written instruments were exhibited and at large set forth in said counter-claim;

(2) Certain interests, estates, capabilities and powers alleged to have been acquired, held and owned by said Fidelity Trust Company in its corporate capacity proper and not in its right ex-officio as said trustee and all which interests and estates these plaintiffs never had been, were not now and never could be the owners equitably or otherwise as grantors to said Fidelity Trust Company in its corporate capacity proper but which said interests and estates were adverse and hostile to the interests and estates of these plaintiffs and of said Fidelity Trust Company, ex-officio as such trustee in the premises. And of which capacities and powers these plaintiffs were not the grantors, but on the contrary, said capacities and powers were exclusive of these plaintiffs and arose out of the act of incorporation of said company and were created and conferred by law; that the said interests, estates, capabilities and powers of said trustee, ex-officio arose out of said contract executed in writing by and
850 between these plaintiffs in error and said trustee, in form said deeds of conveyance and said trust agreement of date Octo-

ber 11, 1909, and being so created, limited and defined were such that they could not nor could any of them be alienated from the welfare and cause of these plaintiffs nor altered and amended without their consent, nor appropriated and conferred by said trustee while acting under and within the terms, authority, province and purpose of said contract, without violating the terms of such contract in such manner and to such effect and intent as to deny to and defeat in said trustee the right to apply said contract and the performance thereof as the foundation and source of said trustee's right to recover herein upon the terms of such contract; that the interests, estates, capacities and powers of said Fidelity Trust Company in its corporate capacity proper being derived from and conferred by law and not by contract with these plaintiffs, were alien, hostile and adverse to the cause of these plaintiffs and that these plaintiffs had not nor had either of them now nor at any time heretofore any interests, estates, capacities or powers within the function of said Fidelity Trust Company in its corporate capacity proper; that by reason of the said distinction and differences which existed between the interests, estates, capacities and powers, ex-officio of the said trustee on the one hand and of said Fidelity Trust Company in its corporate capacity proper on the other hand, there was no identity, community nor unity of right in the said respective interests, estates, capacities and powers such as would authorize, enable and permit said respective interests, estates, capacities and
851 powers to be declared upon at one and the same time and as the joint and common interests, estates, capacities and powers of said trustee ex-officio and of said Fidelity Trust Company in its own corporate capacity proper; that for as much as the defendants asserted solely and only a joint interest and an interest in common between them arising upon the facts which in law deny and defeat any joint interest and any interest in common and any common and single interest, estate, capacity and power, therefore these plaintiffs said that neither of said defendants had stated facts in said counter-claim which constituted either a cause of action or a cause of defense in either of said defendants severally, or jointly; that plaintiffs further said in their said demurrer that if the court should be persuaded that said counter-claim stated solely and only separate rights of action, viz: right of action in said trustee ex-officio on the one hand and a right of action in said Fidelity Trust Company in its corporate capacity proper on the other hand, then would the court order said mis-joinder to be noted upon the order book of the court and cause as many separate actions to be docketed between the parties as there were causes decided by the court to be improperly joined; and plaintiffs further said in their demurrer that in the nature of the action said counter-claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the
852 parties hereto, or (2) upon the single and definite theory of quantum meruit with valuations as fixed by said trust agree-

ment and founded upon the partial and incomplete performance of the so-called trust agreement that such statements of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of quantum valebat founded upon acts done by the said defendants to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value the damages suffered and sustained by said trust estate because of any failure, omission or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate had accepted, appropriated and retained to its own use, benefit and advantage; that said second amended counter-claim averred facts inconsistent with and contradictory of the statement therein "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed," and that because of such inconsistencies and contradictions the said averment is nullified and destroyed, to-wit, the averment "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed." And that in the premises there was no issue tendered by the said second amended counter-claim that the said defendants were entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendants of any contract fixing any liability whatsoever against these plaintiffs in favor of
853 said defendants upon said counter-claim; that further said counter-claim averred no fact in excuse of the failure on defendants' part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendants were entitled herein to employ said trust agreement to fix the value as upon quantum meruit or any act or acts done or claimed to have been done by said defendants under and by virtue of said trust agreement, and that in the premises there was no issue tendered by said second amended counter-claim that said defendants were entitled to any recovery whatever as upon an issue of quantum meruit against these plaintiffs in favor of said defendants upon said counter-claim; further that said second amended counter-claim averred no fact founded upon acts done by said defendants to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate had accepted, retained and appropriated to its own use, benefit and advantage.

6. The Hamilton Circuit Court of Indiana erred in overruling the motions of this plaintiff for an order herein to require the defendant to make more certain and specific as to each of the several particulars respectively enumerated in said second amended counter-claim, said several particulars being as follows, to-wit:

854 First. If it be true as said counter-claim says it is true, that said defendant "has fully and duly performed all of the con-

ditions on its part to be by it performed," then state the facts which cause or excuse as the case may be, the delay on your part in closing up the affairs of said trust during the time of which delay interest charges have accumulated against said trust estate, you say, in the aggregate sum, to-wit, $10,000.

Second. State the facts which cause or excuse, as the case may be, your failure to apply the proceeds of any sale or sales of said real estate made pursuant of said trust agreement as follows: (1) to the payment of any mortgage or other valid lien, charge, adverse interest or incumbrance upon and against said real estate or any part of the real estate herein described which may be prior and superior and adverse to the interests of the Fidelity Trust Company. (2) To the payment of the moneys advanced by second party to first parties or paid to the use and benefit of first parties as in said trust agreement authorized and provided. (3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker, upon her paper as in said trust agreement authorized and provided. (4) To pay to the said Dora E. Rooker, her heirs, executors, administrators and assigns the rest and residue remaining of any money arising from the sale of said real estate.

Third. State the facts which cause or excuse as the case may be, the maturity of the debt which you charge against the plaintiffs.

555 Fourth. State the date on which matured, if at all, the debt which you charge against the plaintiffs.

Fifth. State the facts which constitute the duty and necessity if any on your part, to have employed attorneys, viz: Mr. Henry Seyfried and Messrs. Kane & Kane on the occasions when and for the services in which they were so employed.

Sixth. If it be not in fact true, as stated by you to be true, that you have fully and duly performed all of the conditions of said trust agreement on your part to be performed, then state the facts, if any, in the conduct, action and behavior of these plaintiffs or either of them which constitute the cause or excuse, as the case may be, the failure on your part to carry out and perform the conditions of said trust agreement on your part to be performed.

Seventh. If it be not in fact true as stated by you to be true, that you have fully and duly performed all the conditions of said trust agreement on your part to be performed, and if such failure on your part be not due to the conduct, action or behavior of these plaintiffs or either of them, then state the facts which constitute the cause of your failure to carry out and perform the conditions of said trust agreement on your part to be performed.

Eighth. As to the alleged interest designated in said counterclaim as the American Central Life Insurance Company mortgage,

556 state the fact or facts which constitute your right to have acquired said mortgage by purchase and assignment and your right now to assert said mortgage interest as one hostile

and adverse to your said interests and duties as trustee under and by virtue of said trust agreement, or, in the alternative, if said mortgage was by you acquired as an act of repudiation on your part of said trust agreement, then state such, all such facts as an alternate showing all to the end that these plaintiffs may be advised whether said mortgage is pleaded as a fact within the terms of the trust or as a fact hostile and adverse to said trust.

7. The Hamilton Circuit Court of Indiana erred in overruling the motions of these plaintiffs in error for judgment in their favor on the special findings, which special findings were to the effect (1) an exhibit at large of the trust agreement and the trust deeds affected in the premises by the parties on the 11th day of October 1909. (2) That since the execution of said trust agreement the plaintiff, Dora E. Rooker, has continued in possession of all said lands. (3) That since the execution of said agreement Dora E. Rooker has received the proceeds of said land and has not at any time rendered an accounting therefor to the Fidelity Trust Company as trustee. (4) That the Fidelity Trust Company as trustee has not sold nor conveyed any part of said trust estate conveyed to it by the plaintiffs, but that the title of said trust estate is now in said Fidelity Trust Company, trustee, "and that said Fidelity Trust Company is not claiming or asserting any other title than the title and right set forth in the deeds of conveyance and
857 memorandum of trust hereinafter set out in these findings. (5) "That prior to the commencement of plaintiffs' action, viz: on or about the 15th day of October, 1912, the defendant and cross-complainant Fidelity Trust Company, trustee, served a written notice upon the plaintiffs demanding the payment of a certain sum aggregating Nineteen Thousand six hundred four and four hundredths ($19,604.04) dollars and tendered for delivery its quit-claim deeds conveying and quit-claiming said Hamilton County and said Marion County lands to the original grantors upon the payment of aforesaid sum upon demand and stating that said quit-claim deeds will remain in the office of the Fidelity Trust Company for delivery until October 30, 1912 upon the payment of the demand." (6) That in and about the erection and construction of dwelling house on her Hamilton County land Dora E. Rooker contracted debts for work and labor done and materials furnished and for sums of money borrowed, and also contracted certain liabilities on account of the operation of said farm. That upon orders executed by the said Dora E. Rooker to said Fidelity Trust Company as trustee for the payment of money to the creditors of said Dora E. Rooker, said trust company had laid out and expended Fifteen Thousand eight hundred thirteen and twenty-one hundredths ($15,813.21) dollars; (7) That pursuant of said trust agreement said trust company had also laid out and expended additional sums of money aggregating Twenty-one Thousand one hundred ninety-four and twenty-seven hundredths ($21,194.27) dollars. (8) That no assets came into the possession of said trustee other than the
858 lands described "and that all the moneys paid out by defendant and cross-complainant was the money of the Fidelity Trust Company of Indianapolis, Indiana, a corporation engaged in

the business of operating a trust company under the laws of the State of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced remains wholly unpaid." (9) That by said agreement the said Fidelity Trust Company as trustee was to have certain fees which are stated. (10) That the plaintiffs are entitled to certain credits which are stated. (11) That there is now due and owing the defendant and cross complainant herein the principal sum of Thirty-seven thousand seven and forty-eight hundredths ($37,007.48) dollars, and for interest Fourteen Thousand two hundred seventy-two and twenty-nine hundredths ($14,272.29) dollars, and commission Six hundred twenty and fourteen hundredths ($620.14) dollars. From which certain deductions are allowable, leaving a net aggregate balance due and owing to the defendant and cross-complainant of Fifty Thousand Six Hundred Ninety-seven and fifty-nine hundredths ($50,697.59) dollars. That all the amounts advanced and paid out by the Fidelity Trust Company as trustee, "as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and deeds of conveyance hereinbefore set out to protect and preserve the trust estate, and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker, and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, trustee, is entitled to reimburse
859 itself therefor according to the terms of said trust agreement by the sale of such lands therein provided." (12) That on the 21st day of June, 1917, the defendant Fidelity Trust Company as trustee, served notice upon plaintiffs that it was proceeding to resume the execution of said trust, which said notice is exhibited at large in the special findings. (13) That after the execution of said trust agreement, William V. Rooker expressed and conveyed to defendant, Fidelity Trust Company the intention of the plaintiffs to pay for said advancement. (14) That the Fidelity Trust Company, trustee has used all due diligence to sell said lands mentioned and described in accordance with the provisions of said trust agreement. That the plaintiffs have been, then were and now are asserting an interest in said lands under and pursuant to said trust agreement, and are prosecuting an appeal from a judgment in the Marion Circuit Court of Indiana, quieting the title of the Marion County lands in said Fidelity Trust Company as trustee and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as trustee to said Marion County lands and from denying or disputing, obstructing or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust; that the assertion of interest in said lands by plaintiffs as hereinabove stated adverse to the interest of the Fidelity Trust Company as trustee under said trust agreement is unfounded and without right.

860 8. The Hamilton Circuit Court of Indiana erred in each of its conclusions of law and these severally were to the effect as follows:

First. That the law was with the defendant on the issues joined on plaintiffs' complaint.

Second. That the law was with the cross-complainant on the issues joined on the defendant's cross-complaint.

Third. That the legal title to the lands described in the deeds and instrument of trust set out in the finding of facts was held and vested in defendant Fidelity Trust Company, trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust and said defendant was entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

Fourth. That the defendant and cross-complainant Fidelity Trust Company was entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

Fifth. That the defendant and cross-complainant was entitled to judgment on account in the sum of $50,697.00 to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

Sixth. That the defendant and cross-complainant was entitled to recover its costs in this action taxed at $—.

9. The Supreme Court of Indiana erred in overruling each of the several exceptions of plaintiffs in error to the respective con-
861 clusions of law of the Hamilton Circuit Court of Indiana.

10. The Hamilton Circuit Court of Indiana erred in overruling the motion of these plaintiffs in error to modify the judgment herein in each of several respects stated in particular to the effect following:

Particular No. 1. To strike out from the entry of said judgment the following words: "It is, therefore, considered, ordered, adjudged and decreed by the court that plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described," and for cause plaintiffs say that so much of said entry as above quoted contravenes the law of the case as decided by the Supreme Court on the former appeal.

Particular No. 2. To strike out and suppress from said entry of judgment the following words, to-wit: "It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings" and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal.

Particular No. 3. To strike out and suppress from said
862 entry of judgment the following words, to-wit: "By taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise and in no other capacity." And for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

Particular No. 4. To strike out and suppress from the entry of judgment the following words, to-wit: "That said defendant and cross-complainant, Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under duty to sell and convey said lands by deeds of warranty of the fee simple title, and give full possession of the same." And for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

Particular No. 5. To strike out and suppress from the entry of judgment the following words, to-wit: "It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, is entitled to judgment on its action against said trust estate to be paid out of the proceeds of the sale of the trust so held in trust by
863 it, as hereinbefore provided, in the sum of fifty thousand six hundred ninety-seven dollars," and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal of this case.

Particular No. 6. To strike out and suppress from the entry of judgment the following words, to-wit: "It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging and the right of the possession thereof, and the use, rents and profits thereof, and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement; that any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive to the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker, be and they are, each and both, hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession, use and rents and

profits thereof, and from denying, disputing, obstructing or in
864 any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession, and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands as aforesaid," and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case, and the plaintiffs would further show unto the court that said trust was not at any time a trust of investment, or representing a trust of investment or of income, but said trust was solely a trust affecting the principal of said trust estate and said trustee was to have been active only in making the trust sale in the matter of converting said trust estate into cash and the maintenance of said trust estate pending the sale and the distribution of the proceeds of said trust estate and said trust was not at any time a trust affecting the possession, rents and profits thereof prior to such sale.

Particular No. 7. To strike out and suppress from the entry of judgment the following words, to-wit: "It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple
and put the purchaser or purchasers thereof in possession;
865 that said Marion County lands having failed to sell for the sum of eighteen thousand dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid then said trustee shall after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of sixty-five thousand ($65,000.00) dollars; that if said Hamilton County lands do not sell for said sum of sixty-five thousand ($65,000.00) dollars for lack of a bid for that sum, then said trustee after ninety (90) days' notice in writing to plaintiffs of their intention so to do, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands under this decree they do not fetch enough to pay the money and perform the obligations against said trust estate in this action found to exist and be due, then said trustee shall, after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell and sell and

convey said Hamilton County lands for whatever sum and price they will bring, using diligence to procure the highest and
866 best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval." That for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

Particular No. 8. To strike out and suppress from the entry of judgment the following words, to-wit: "It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sale or sales as follows: (1) to the payment of the costs of this action; (2) to the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described which may be prior and superior ad adverse to the interest of said Fidelity Trust Company, trustee; (3) to the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of fifty thousand six hundred ninety-seven ($50,697.00) dollars; 4) to the reimbursement of said Fidelity Trust Company of any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree; (5) the rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns," and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

867 11. The Hamilton Circuit Court of Indiana erred in overruling the motions of these plaintiffs in error for a new trial.

12. The Hamilton Circuit Court of Indiana erred at the trial of the cause in overruling the motions of these plaintiffs in error to strike from their counter-claims and answer the name of the Fidelity Trust Company in its corporate capacity proper "And we ask that that motion be extended to include all pleadings in which the Fidelity Trust Company as trustee and the Fidelity Trust Company in its corporate capacity proper appear to be jointly litigating these particular rights, the said motion more particularly appearing upon the record as follows: Upon the offer in evidence of a voucher in favor of George W. Kryser objection was made that the memorandum now offered "is offered both by the Fidelity Trust Company in its corporate capacity proper, pleaded as such in this case, and also by the Fidelity Trust Company as trustee, etc.;" That thereupon Mr. Seyfried of counsel for the defendants stated to the court: "On behalf of the Fidelity Trust Company, I would like for the record to show that this payment, and all other payments made by it, were made by the Fidelity Trust Company pursuant to and under the agreement of trust and upon the security of the deeds of conveyance herein introduced; and that the only relation that the Fidelity Trust Company proper has thereto is that the Fidelity Trust Com-

pany as Trustee had no funds belonging to the trust estate
868 and that the funds with which the payment of this voucher, and all other vouchers, — were made to and furnished by the Fidelity Trust Company. I state this in order that our position in this case may not be confused by the distinction which the plaintiffs seek to make."

13. The Hamilton Circuit Court erred at the trial of the cause in admitting in evidence defendants' Exhibit No. 3, being a voucher drawn on the Fidelity Trust Company and paid by it the Indianapolis Mortar and Fuel Company for $60.00 on September 10, 1909, the objection being stated in these words: "The plaintiffs by counsel object to that for the reason that there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is trustee; that this exhibit is now offered by the Trust Company as trustee in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them and, therefore, is not evidence in favor of either of them.

That thereupon Mr. Seyfried of counsel for the defendants stated to the court: "The trustee had no funds; the funds that were advanced were the funds of the corporation; that is the only thought in mind in this case, to bring to the attention of the court, is that the principal of this trust fund furnished. We got no funds no capital and that the capital was taken from the corporate treasury of the trustee."

14. The seventeenth finding of fact made by the Hamilton Circuit Court of Indiana is not sustained by sufficient evidence
869 and it is contrary to law. It is to the effect "that all the amounts advanced and paid out by the defendant Fidelity Trust Company, trustee, as hereinbefore set out were paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance hereinbefore set out to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, trustee, is entitled to reimburse itself therefor according to the terms of the trust agreement by the sale of the lands therein provided."

15. The thirteenth finding of fact of the Hamilton Circuit Court of Indiana is not sustained by sufficient evidence and is contrary to law. It is to the effect: "That no assets came into the possession of the trustee other than the lands described and that all the money paid out by the defendant cross-complainant was the money of the Fidelity Trust Company of Indianapolis, Indiana, a corporation, engaged in the business of operating a trust company under the laws of the State of Indiana, and that no part of the amount paid out and advanced has ever been repaid and that the full amount paid out and advanced, less credits hereinafter allowed remains wholly unpaid."

16. The sixteenth finding of fact made by the Hamilton Circuit Court of Indiana is not sustained by sufficient evidence and is contrary to law. It is to the effect that there is now due and owing to the defendant and cross-complainant herein from the plaintiff's cross-defendants herein, the principal sum of thirty-seven thousand seven and forty-eight hundredths ($37,007.48) dollars; and for the interest thereon the aggregate sum of Fourteen thousand two hundred twenty and twenty-nine ($14,220.29) Hundredths dollars; and for commission two (2) per cent on all funds paid out in excess of six thousand ($6,000.00) dollars the aggregate sum of six hundred twenty and fourteen hundredths ($620.14) dollars from which shall be deducted the aggregate sum of nine hundred eighty-two and eighty-one ($982.81) hundredths dollars, together with interest thereon amounting to two hundred eighteen and fifty-one hundredths ($218.51) dollars, being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein the sum of fifty thousand six hundred and ninety-seven and fifty-nine hundredths ($50,697.59) dollars. 570

17. That the 20th finding of fact made by the Hamilton Circuit Court of Indiana is not sustained by sufficient evidence and is contrary to law. It is to the effect "That said Fidelity Trust Company, trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said trust agreement hereinbefore set out, but that said Marion County lands were not sold within one year after the execution of said memorandum and deeds and have not yet been sold by said trustee under said trust provisions; that ninety (90) days' notice in writing was given as set out in the previous findings, notifying plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that plaintiffs have been, were then and are now asserting an interest in said lands adverse to the rights of said trust company as trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands adverse to the right of said trust company as trustee and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above. That the plaintiffs in open court have disputed and now deny the right of said trust company as trustee to sell the lands conveyed to it in trust and are actively opposing such efforts to sell and are now resisting the sale of said lands or any of them by said trustee and are now prosecuting an appeal in the appellate court from a judgment of the Marion Circuit Court, quieting the title of the Marion County lands in said Fidelity Trust Company as trustee and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as trustee to said Marion County lands and from denying disputing, obstructing or interfering with the sale of said lands under and pursuant to 571

its power of sale contained in the memorandum of trust; that the assertion of interest in said lands by plaintiffs as hereinabove stated adverse to the interest of Fidelity Trust Company as trustee under said trust agreement is unfounded and without right.

18. The Hamilton Circuit Court of Indiana erred at the time of the cause in admitting in evidence over the objection of these plaintiffs the defendants' exhibit No. 46 the same being the county
872 treasurer's receipt of $87.46 for delinquent penalty and taxes on the Marion County lands, in Lawrence township, of the trust estate for the years 1916-17, the objection of the plaintiffs to the introduction of said receipt being to the effect that at the time this payment was made the Fidelity Trust Company was claiming, and had of record, the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, was made in aid of the Trust Company's own wrong and in violation of the trust agreement, and, therefore, is not a charge against the trust estate; and that, at the time this payment was made, the title was of public record in the name of the Fidelity Trust Company under proceedings adverse to the trust estate.

19. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the Court's first conclusion of law, to the effect that the law was with the defendant on the issues joined on plaintiff's complaint.

20. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the court's second conclusion of law, to the effect that the law was with the cross-complainant on the issues joined on the defendants' cross-complaint.

21. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the court's third conclusion of law, to the effect that the legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant Fidelity Trust Company, trustee, with full power to convey the same to the terms of said trust, and said defendant is entitled to have its title quieted and to have
873 injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

22. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the court's fourth conclusion of law, to the effect that the defendant and cross-complainant, Fidelity Trust Company, was entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

23. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the court's fifth conclusion of law to the effect that the defendant and cross-complainant was entitled to judgment on account in the sum of $50,697.00 to be paid out of the

proceeds of such sale according to the terms of such trust deeds and trust agreement.

24. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiff to the court's sixth conclusion of law to the effect that the defendant and cross-complainant was entitled to recover its costs in this action taxed at $—.

25. The Supreme Court of Indiana erred in affirming the judgment of the Hamilton Circuit Court of Indiana as to each of the several errors exhibited in this assignment of errors.

26. The Supreme Court of Indiana erred in overruling the
874 plaintiffs' verified petition for a rehearing to the effect:

First. That the opinion and judgment of the Supreme Court of Indiana is erroneous in sustaining the judgment of the Hamilton Circuit Court of Indiana, which was erroneous in sustaining the constitutionality of the act of the general assembly of Indiana entitled "An Act concerning proceedings in civil and criminal cases," approved March 15, 1913 (Acts 1913, page 850) which said act impairs the obligation of the trust agreement made and entered into on the 11th day of October, 1909 by and between the appellant, Dora E. Rooker, her husband and co-appellant, William V. Rooker, joining with her and the Fidelity Trust Company, as trustee, whereby said Dora E. Rooker appointed and constituted the Fidelity Trust Company trustee, to assume *the* perform certain trusts and powers stated and defined in the written memorandum of said contract and which said trust said Fidelity Trust Company, as trustee accepted and undertook to perform upon the terms and in the form and manner prescribed in said contract, said contract being the same contract in issue in this suit, and because said statute so impairs the obligation of said contract said statute is in contravention of Article I, section 10 of the Constitution of the United States and is void.

Second. That the opinion and judgment of the Supreme Court of Indiana is erroneous in sustaining the judgment of the Hamilton Circuit Court of Indiana, which was erroneous in that it denied to these appellants, and to each of them due process of law and
875 the equal protection of the laws for the defense of their property and the enforcement of their rights, in contravention of the Fourteenth Amendment of the Constitution of the United States, said denials of due process and of the equal protection of the laws being in each of the particulars following, to wit:

1. Said judgments and each of them deny to these appellants and to each of the, the common, ordinary and usual remedies of the law for the defense and enforcement of their rights of contract affected in the premises as hereinafter more specifically set forth.

2. Said judgments and each of them take the property of these appellants and each of them without their having had their day in

court upon any issue tendered by any person competent and qualified to sue for the determination of said rights of property, or any of them.

Third. That the opinion and judgment of the Supreme Court of Indiana is coram non judice and void because of the participation therein of Judge Louis B. Ewbank, a member of said court who was incompetent and disqualified to sit because of adverse interests in his behalf then and there existing, had and entertained by him, apparent on the following facts:

(1) There was introduced and read in evidence on the trial of this cause in said Hamilton Circuit Court, over the objections of these appellants a transcript of the record of the judgment of the Marion Circuit Court of Indiana in cause No. 25260; that in said cause 25260 these appellants were plaintiffs and George V. Coffin, as Sheriff of Marion County, in the State of Indiana and the Fidelity Trust Company in its corporate capacity proper were de-
876 fendants; that said suit was to the effect that certain unlawful liens and incumbrances had been placed on certain Marion County lands of these appellants by means of pretended sheriff's sales thereof; that said Marion County lands are the identical Marion County lands described in the deed of trust herein as being the Marion County lands of these appellants conveyed to said trustee; that said sheriff's sales were made upon a certified copy of the judgment and decree of said Hamilton Circuit Court which judgment and decree was thereafter set aside and vacated by this court on the 5th day of October, 1915 (185 Ind. 172); that in and by their said action these appellants as said plaintiffs sought to have the title of, in and to said Marion County lands cleared of the cloud placed thereon by said sales; that said action was begun by these appellants, as said plaintiffs, filing their complaint in the office of the clerk of said Marion Circuit Court and causing summons to issue thereon for the defendants named; that said complaint was filed on to wit, the 26th day of May, 1915; that Charles E. Cox, Esq., at present one of the attorneys in this cause of said Fidelity Trust Company was a judge of the Supreme Court of Indiana, at the time said opinion and judgment of this court was rendered on the 5th day of October, 1915, reversing said judgment and decree of said Hamilton Circuit Court, and apparently he participated in the rendition of said judgment of this court and concurred therein; that when he retired from membership in this court said Cox appeared as attorney and counsel for appellee the Fidelity Trust Company in the matters in controversy in this suit affecting this trust and he with another, filed in said cause No. 25260 in said Marion Circuit Court the cross complaint of said Fidelity Trust Company in
877 its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, and caused summons to be issued on said cross complaint for said Dora E. Rooker and William V. Rooker; that said cross complaint was on the theory that said cross complainants had been continuous and faithful in the performance of their duties in the administration of said trust

and that they had faithfully performed said duties; that said Dora E. Rooker and William V. Rooker had by their said trust deed conveyed all their interest in said trust estate; that said Dora E. Rooker and William V. Rooker were wrongfully and unlawfully meddling with said property and were interfering with and preventing said defendants from performing the duties required in the administration of said trust; that said Dora E. Rooker and William V. Rooker should be adjudged to have no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that throughout said proceedings said Cox had appeared in his individual name and not in the name of his firm, Woollen, Cox & Wellliver, of which firm Mr. Evans Woollen is and for many years last past has been president of the Fletcher Savings and Trust Company, one of the oldest and one of the largest trust companies in Indiana; that said Ewbank, as said judge of said Marion Circuit Court found against these appellants as plaintiffs in said cause and he sustained said cross complaint on the trial of said cause and rendered judgment accordingly, including that these appellants there present as plaintiffs in said complaint and as defendants in said cross complaint had no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that said judgment was given and rendered by said Ewbank on the 5th day of February, 1918, and he fixed the penalty of the appeal bond therein at five thousand dollars, which these appellants were unable to give because their property was in the hands of said trustee; that on the 29th day of May, 1918, these appellants, as said plaintiffs, filed in the office of the clerk of this court their certified copy of the record proceedings and judgment of said Marion Circuit Court in said cause No. 25260, together with assignments of error thereon and caused notice to be issued thereon; that said cause was docketed in this court as cause No. 23477 but was afterwards transferred to the docket of the Appellate Court of Indiana as Cause No. 10444, where the same is pending for decision; questions at issue in said Cause No. 25260 and determined by said Ewbank and carried into the record in this cause by the introduction in evidence in this cause of said judgment in said Marion Circuit Court in said Cause No. 25260, embody issues involved in this appeal, all to the effect that said Ewbank in sitting as a judge in this cause in this court is required to pass upon his own errors while sitting as a judge in said cause No. 25260 in said Marion Circuit Court; that said action of said Ewbank in sitting in the determination of this court is beyond the precedents and traditions of this court; that appellants knew that said Ewbank sat with the other members of this court at the oral argument of this cause, but appellants then believed, as they lawfully might do, that he came upon the bench without information as to the nature and issues of this cause and that he would recuse himself and not participate further when he became informed; but appellants say that the memorandum of the opinion of this court filed in the office of its clerk in this cause, contains no notation that said Ewbank did not sit and that the text of the said opinion

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as published in the advance sheets of the North Eastern Reporter does not disclose that said Ewbank did not sit; that it is a custom and usage, and may be said to be a rule of this court, to note on the memorandum of opinions and judgment where a judge does not participate in the decision of a cause, and, knowing these things and upon the information they impart and believing them to be true, appellants say that Judge Ewbank sat in the determination of this cause while he was incompetent and disqualified to sit.

(2) And as to the further interest of Judge Louis B. Ewbank in the matters and things involved in this cause and the precedents to be established thereby to the benefit and advantage of trustees, appellants say that in and by the last will and testament of one Volney T. Malott, late of said Marion County, the said Louis B. Ewbank was nominated and appointed co-executor and co-trustee of the estate of said Malott, valued at many millions of dollars and embracing holdings of stock in banks and trust companies competent under the law to accept and execute trusts of the kind and character of the trust involved in this suit; that among said holdings of stock in banks and trust companies by said Ewbank and his co-executors and co-trustees are First National Bank, Brazil, Indiana, stock valued at $30,000.00; Indiana National Bank, Indianapolis, Indiana, stock valued at $662,500.00; Union Trust Company, Indianapolis, Indiana, stock valued at $65,000.00; that it would be greatly beneficial to said banks and trust companies and enhance the value of
880 the stock of said banks and trust companies to have the law established as being that trustees were not liable for the maladministration of their trusts nor for the waste and conversion of their trust estate and that a trustee could not be held to respond to the complaint of a cestui que trust that the trustee was guilty of maladministration of a trust and waste and conversion of the trust estate and that there was no party in interest competent to invoke the jurisdiction of a court to command a trustee to fidelity in the administration of a trust, nor to invoke the jurisdiction of a court to determine that a trust agreement, of the nature and kind affected by this suit, could be adjudged to have been repudiated by the trustee and thereupon rescinded by the parties aggrieved, nor to invoke the jurisdiction of a court to remove a trustee who was at fault and to sequester the trust estate by the appointment of a receiver therefor to the end that the trust estate could be administered for the benefit of all the parties in interest and not solely for the benefit of the trustee; that said Volney T. Malott departed this life June 14, 1921 at said Marion County; that at the time of his death he was more than eighty years of age; that on the 8th day of March, 1916, said Malott, knowing his advanced years and comprehending the near approach of his death in the usual processes of nature, executed his said will wherein he nominated the said Louis B. Ewbank together with Thomas H. Kaylor and John Malot Fletcher co-executors of his said will with the right of survivorship and in and by said will he appointed said Ewbank, Kaylor and Fletcher co-trustees of his estate, with the right of survivorship, said trusteeship

881 to become effective when the statutory period had expired for the administration of said estate and the final settlement thereof, usually a minimum of thirteen months after the issuance of letters, and said trusteeship was thereafter to continue in said Ewbank, Kaylor and Fletcher, and in the survivor of them, until the second day of March, 1944, an approximate period of twenty-three years, when said trust was to be closed and the proceeds thereof distributed as provided in said will, said trustees to take credit for their charge including certain annual charges payable out of the income of said estate; that said Kaylor and Fletcher are bank clerks and said Ewbank is the only lawyer among said co-executors and said co-trustees; that these appellants are informed and believe, and upon information and belief state the fact to be, that said Ewbank knew of his appointment as said executor and trustee and of the interests, duties, rights, powers, opportunities and all the circumstances thereof when the same was made, and that he had such knowledge on the 5th day of February, 1918, when as Circuit Judge he heard and determined said Cause No. 25260 in said Marion Circuit Court; that these appellants did not have nor did either of them have, any knowledge whatsoever as to the said will of said Malott nor as to any provision thereof, nor as to the appointment of said Ewbank as such co-executor and co-trustee until after said will was probated in the Probate Court of said Marion County on the 20th day of June, 1921, when the provisions of said will were set forth in the daily newspapers and those publications imparted to these appellants, and to each of them, the first information and the first means of information, they, and each of them, had as to said last will and testament and as to any of its provisions and that

882 said Ewbank had any of the interests, duties, rights, powers, opportunities and purposes which he now has, holds, entertains and enjoys; that upon the probate of said last will and testament said Ewbank duly accepted said trust and qualified and is now a duly incumbent co-executor of said will and he intends to and will perform the office of said trust until the time arrives when he should qualify as co-trustee of said estate, valued at many millions of dollars, under said will; that he intends to, and then will, assume the office of said co-trustee and qualify as such; that prior to the decision of this case by the Supreme Court of Indiana, it always had been the law of this state that the maxim prevailed, nemo debet esse judex in propria sua causa—no one ought to be a judge in his own cause—and that judicial proceedings were void where the judge who made the ruling had an interest which might affect him in the performance of his duty in the premises; that upon the premises the said judgment of said Marion Circuit Court in said cause No. 25260 was unlawful and void and its introduction in evidence on the trial of this cause was unlawful and the participation of said Ewbank in the consideration of this cause was unlawful and denies to these appellants and to each of them due process of law and the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

Fourth. The opinion and judgment of the Supreme Court of Indiana wrongfully and unlawfully burdens, obstructs and defeats the rights of these appellants to present for consideration the federal questions, and each of them, that said opinion and judgment
883 impairs the obligations of plaintiffs said trust contracts of October 11, 1909, in contravention of Art. I, sec. 10 of the Constitution of the United States, and that said opinion and judgment deprive these appellants and each of them of property without the process of law, and deny to these appellants and each of them the equal protection of the laws, all in contravention of the Fourteenth Amendment of the Constitution of the United States; that said opinion and judgment does so burden, obstruct and defeat the said rights of these appellants, and of each of them to present said Federal questions and each of them by (1) wrongfully and unlawfully adding to the terms and conditions imposed by the Supreme Court of the United States upon which a Federal question may be raised and presented, certain alleged rules, interpretations and dicta and (2) by erroneously, wrongfully and unlawfully construing and applying said alleged rules, interpretations and dicta as applied to this case and all in the form and manner and to the effect following, that is to say: In appellants' original brief on the merits filed in the Supreme Court of Indiana in this cause, on to wit, the 15th day of December, 1919 the following appears, beginning on page 286, to wit:

Proposition B. Second Error.

The judgment of the trial court denies to the trust estate due process of law and takes the property of the trust estate, without the equal protection of the law, and impairs the obligation of the trust contract.

Point 1.

"Individual citizens require protection against judicial action as
884 well as against legislative; and perhaps the question, 'What constitutes due process of law?' arises as often when judicial action is in question as in any other cases. * * * The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, first, of the subject matter; and, second, of the persons whose rights are passed upon."

Cooley's Const. Lim. 6th Ed. p. 491.
Windsor v. McVeigh, 93 U. S. 274, 277.
Pennoyer v. Neff, 95 U. S. 714.
Huling v. Kaw Valley Ry., 130 U. S. 564.
Scott v. McNeal, 154 U. S. 34, 46.
New Orleans Water Works v. New Orleans, 164 U. S. 471, 480.

Point 2.

In this case there is no personal judgment against these appellants, but there is against them a judgment in rem quieting title, etc.

There is a judgment in rem defining the nature of the appellees' interest in the trust estate and stating the value thereof to be $50,697.50.

Ante, p. 216; Tr. p. 340, ll. 22-30; p. 341, ll. 1-8.
Ante, p. 216; Tr. p. 348, ll. 22-30; p. 341, ll. 1-8.
Ante, pp. 50-51; Tr. p. 348, ll. 9-30; ll. 1-7.
Ante, pp. 188-9, Particular No. 9.
Ante, pp. 272-3.

Point 3.

On the complaint, the court found against the appellants as plaintiffs and that they had no right to maintain this, their action. And judgment was rendered accordingly. The judgment against the appellants as plaintiffs included an injunction against the plaintiffs including these words, viz: "It is further considered, adjudged
885 and decreed by the court that said plaintiffs Dora E. Rooker and William V. Rooker by said deed of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and to the right of possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of sale thereof as may remain to be distributed to said Dora E. Rooker under this judgment and said trust agreement; that any other interest in or control over said lands than such interest in the proceeds aforesaid, heretofore and now being asserted by said plaintiffs adverse to the title of said trustee is wrongful, without right and unfounded and an obstruction of the completion of the execution of said trust by said trustee and said Dora E. Rooker and William V. Rooker be and they are hereby each and both perpetually enjoined from denying or disputing the said title of said Fidelity Trust Company as trustee, to said lands above described and its right to the possession, use, rents and profits thereof and from denying or disputing the said title of said Fidelity Trust Company as trustee, to said lands above described and its right to the possession, use, rents and profits thereof and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale conferred by said deeds and trust agreement and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or purchasers in giving possession or taking possession when sale shall have been made as aforesaid."
886 Ante, pp. 50-51; Tr. p. 348, ll. 9-30; p. 349, ll. 1-7.

Point 4.

The judgment of the court in the particulars noted under Point 3, supra, was the mere consummation of a wrong theory adopted by the trial court at the beginning, viz: That these appellants had no interest whatsoever in the premises and were therefore incompetent to produce any issue upon which the appellees were obliged to respond.

Ante, pp. 158-275: How the errors relied upon arise upon the record.

Point 5.

The issues tendered by the cross-complaint were not brought into the record as by answer or counter-claim upon summons directed by the plaintiffs to the defendants. On the contrary, the cross-complainants adopted and pursued the trial court theory that their right of recovery was on a distinct action which required a writ of summons to issue in their behalf. This writ of summons was directed not against the nominal trustee nor against any person so representing the trust estate. The entry follows, viz: "And the court now orders the clerk of this court to issue summons on said cross-complaint to said Dora E. Rooker and William V. Rooker, said summons to be returnable on the 7th day of April, 1913. Tr. p. 15, ll. 7-10.

Point 6.

Appellees are bound by their trial court theory that appellants were incompetent to bring and did not bring the trust estate into
887 court. Having asked and got judgment on that theory they are concluded thereby. Appellees' conduct in the premises was an election of remedies. The election of remedies is held to be conclusive and it applies to pleadings and procedure in courts.

John v. Greist, 85 Ind. 503.
Mescall v. Tully, 91 Ind. 96.
Dawson v. Shirk, 102 Ind. 184, 188.
Chicago, etc. Co. v. Bills, 104 Ind. 13.
Ikerd v. Beavers, 106 Ind. 580, 588.
Green v. Grooves, 109 Ind. 519.
Carr v. Haskett, 110 Ind. 152, 155.
Baker v. Ludlam, 118 Ind. 87.
Aetna etc. Co. v. Hildebrand, 137 Ind. 462.
State v. Scott, 171 Ind. 349.
Elliott's Gen. Prac. Secs. 945, 1013.
5 Lawson's Rights, Rem. and Pr., Sec. 2498.

Point 7.

The nominal trustee joined with its creditor, the Fidelity Trust Company in its corporate capacity proper, as co-plaintiff in a cross-complaint to enforce a claim of the creditor against the trust estate in a cause where the trust estate was not sued; where the trust estate was without notice issued to it or served upon it as to the cross-complaint on which recovery was had. The nominal trustee could not sue itself and it did not sue itself nor the trust estate. The nominal trustee could not defend itself in its own action, nor the trust estate. The trustee is a judgment plaintiff here in a judgment in rem against the trust estate on issues tendered against the trust estate by the nominal trustee and as to which issues the trust estate never was sued. The judgment is void. Vide authorities supra.

1 Burns R. S. 1914, Sec. 252.
Mitchell v. St. Mary, et al., 148 Ind. 111, 115.
Marion Bond Co. v. Mexican etc. Co., 160 Ind. 558, 563.

888 Point 8.

Denial of due process of law and denial of the equal protection of the law may arise upon a judicial record as it may arise otherwise. In the instant case it arises upon a judicial record. The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities.

Scott v. McNeal, 154 U. S. 34-45; 38 Law Ed. 896, 901.
Forsythe v. Hammond, 142 Ind. 519; 30 L. R. A. 583.

Point 9.

It was a denial of due process and it was a denial of the equal protection of the law and it was the impairment of the obligation of a contract for the trial court without the trust estate having been sued and without any issue being tendered to that effect, to reform the trust deed so as to take from appellants the rights which they had never parted with and which they never had granted away, viz:

A. The power coupled with an interest in their behalf to protect in any lawful manner the trust as they had created it.

B. The power coupled with an interest in their behalf to protect the trust as they had created it, and which embraced the power retained in them as grantors to appoint a new trustee for cause:
889 and limited any power of appointment by the court to the appointment of a receiver who should sequester the trust estate and hold it in custodia legis while the court was engaged in determining the rights of the parties under the trust agreement at the time the litigation began.

C. The power coupled with an interest in their behalf to protect the right of possession and the uses of the rents and profits of the trust estate pending the progressive execution of the trust.

D. The power coupled with an interest in their behalf to enforce the obligation that time was of the essence of the trust agreement.

E. The power coupled with an interest in their behalf to enforce the obligation of the trustee to do and perform as in the trust agreement provided for, and as the consideration for the trust agreement.

F. The power coupled with an interest in their behalf to enforce the obligation of the trustee to engage its fidelity to the performance of the trust.

G. The power coupled with an interest in their behalf to enforce the obligation of the trustee as a contractual consideration for the mutual covenants of the trust contract that the trust with fidelity on

the part of the trustee should be performed in the time, form and manner and upon the terms particularly stipulated and set forth in the memoranda creating the trust.

890 Point 10.

The court could no more take these vested rights from the grantors of the trust without a lawful and proper issue to reform for lawful and proper grounds the trust agreement, and without the trust being in court, than the legislature could have taken them upon its mere ipse dixit in the form of a pretended statute.

McClellan v. Coffin, 93 Ind. 463.
Conant v. National Bank, 121 Ind. 323.
Perkins v. Haywood, 124 Ind. 445, 450, 451.
Reynolds v. Louisville etc. R. Co., 143 Ind. 579, 644-634.
Stenzel v. Boyce, 143 Ind. 642, 646.
Love v. Turpie, 147 Ind. 652.
Harrison etc. Ass'n v. Lackey, 149 Ind. 10, 14.
Indianapolis etc. R. Co. v. Houlehan, 157 Ind. 494, 506.
Stewart v. Knight etc. Co., 166 Ind. 498.
Huber Mfg. Co. v. Wagner, 167 Ind. 498.
Harrison Tp. v. Addison, 176 Ind. 386, 396.

Point 11.

"Testing the case by the principle 'that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts and under circumstances repelling all presumptions of fraud, imposition or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is were the appellants entitled to relief? To which we respond decidedly in the negative' Mr. Justice Catron in Bank etc. v. Daniels, 12 Pet. 32, 56; L. Ed. 989, 998.

Upton v. Tribilcock, 91 U. S. 50; 23 Law Ed. 206.
Lamborn v. County Commissioners, 97 U. S. 181, 185; 24 Law Ed. 926-929.
Bond v. Coats, 16 Ind. 203.
891 Oiler v. Gard, 23 Ind. 212, 219.
Town of Ligonier v. Ackerman, 44 Ind. 552, 568-578.
Bennett v. Ford, 47 Ind. 264-269.
Hines v. Board, 93 Ind. 266.
Parker v. Bank, 59 Ind. App. 189, 192-4.

Point 12.

"The cestui que trust may bring a bill or petition for removal, and the court may remove the trustees from office and appoint others in their place when there has been bad conduct, or the trustee is unfit for his office, or to prevent a threatened breach of the trust or any danger to the trust fund."

Perry on Trusts, 5th Ed. Sec. 817.

Point 13.

"Proceedings for the removal of trustees and the appointment of others require some time, as trustees have the right to file answers to the charge against them and to regular and full hearing; and as the cestui que trust are entitled to have the fund properly protected and managed in the meantime, the court may appoint receivers."

Perry on Trusts, 5th Ed. Sec. 818.

Point 14.

"The cestui que trust is entitled to enforce the trust, not only against the trustee, but also against those who with notice, wrongfully claim under the trustee.

Perry on Trusts, 5th Ed. Secs. 821, 822.

Zimmerman v. Makepeace, 152 Ind. 199.

Point 15.

"The powers of trustees under deeds of trust, and of mort-
92 gage-s under mortgage with power of sale, depend entirely upon the terms of the deeds. Such powers are created by, and exist in the deeds, and of course they exist in the terms in which they are created in no others. They are to be exercised by the trustees in pais. They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. Statutes in some states have regulated their execution, but such statutes do not create the powers themselves."

Perry on Trusts, 5th Ed., Sec. 602*g*.

Point 16.

In the consideration of a court of equity the cestui que trust is actually seized of the freehold.

Croxall v. Sherard, 5 Wall. 268; 18 Law Ed. 572.

Proposition C. Second Error.

The appellees are in the dilemma of one who occupies a double position. (1) If their second amended counter-claim is to be read as an answer it is to be read in the light of the complaint in which event all those items go out of the case which represent events following the filing of the complaint on October 30, 1912, the complaint reposing on the trust agreement and its repudiation by the trustee. (2) If their second amended counter-claim is to be read not as an answer but as a cross-complaint, then the trust estate is not
92 in court because the trustee could not sue itself on its own cause of action.

To sustain this proposition we offer the following points,

Point 1.

Nor can it be said that the payments made after the election of the trustee to repudiate the trust were made under duress because (1) there is no issue to that effect in this record and (2) because the duress, if any, could be confined only to the fear of tax sale or foreclosure of prior mortgages. The act of repudiation would estop the appellee from making such defense of payment under duress (1) it was the duty of the trustee to protect the entire trust and not merely the trustee's interest therein and (2) it would be a wrongful and unlawful severance of the trustee's duties to the trust to admit that the trustee might make the payments to protect its own interests in the trust estate and at the same time abandon the protection of the interests of the cestui que trust against tax sale or foreclosure. Unless the payments were made to protect all the interests of everybody affected by the trust, the payments would be not only voluntary but wrongful. It is wrongful for a trustee to abandon the interests of cestuis que trust. The record shows that after the act of repudiation on October 28, 1912 (Tr. p. 385) the appellees set about to acquire title to the entire trust estate as upon foreclosure. It is the law of this case as settled by the former opinion of this court, that those foreclosure proceedings were wrongful and unlawful. While that wrongful and unlawful conduct was being pursued by the appellees they claim to have made
894 the certain payments including the purchase of the American Central, etc. mortgage. Upon the acquisition of that mortgage the Fidelity Trust Company at once proceeded to foreclose that mortgage and to that effect file its complaint on May 15, 1914 against these appellants, who were cestuis que trust in the trust agreement (Tr. p. 736). Voluntary payments cannot be recovered back.

See cases Point 9, supra.

Point 2

One who acts in aid of his own wrong not only denies himself the right to recover voluntary payments he made in advancing his unlawful purposes, but also being a wrong doer, he fails to come into equity with clean hands and cannot enforce therefore subrogation nor sue in the right of one whose interest the wrongdoer acquired.

Wilkinson v. Babbitt, 1 Dillon C. C. 207; 29 Fed. Cas. 17,69

Point 3.

"Was it ever known that a fraudulent purchaser of property when deprived of its possession could recover for his repairs or improvements or for incumbrances lifted by him whilst in possession? If such a case can be found in the books we have not been referred to it. Whatever a man does to benefit an estate under such circumstances, he does in his own wrong. He cannot get relief by coming into equity."

Railroad Co. v. Soutter, 13 Wall. 517, 523.

Point 4.

895 It is settled as the law of this case that the appellees' foreclosure of the trust deed as a mortgage was wrongful and unlawful; the title acquired under the decree of foreclosure was consequently wrongful and unlawful; every step taken and every act done in aid of the wrongful repudiation and foreclosure was ultra vires the trust and was wrongful and unlawful.

Rooker v. Fidelity Trust Co., 185 Ind. 172.

Point 5.

"The doctrine of subrogation applies only to lawful and meritorious transactions. It is a doctrine which prevails only in equity; and it would be absurd to say if the transaction were illegal and void, and could not be upheld for that reason, that these mortgages, which, if paid for at all by the company, were based upon such illegal transactions * * * could be enforced by them."

Farmers Loan etc. Co. v. Carroll, 5 Barb. 613, 660.

Point 6.

"The law cares very little what a fraudulent party's losses may be and cares nothing for his sake."

Guckenheimer v. Angevine, 81 N. Y. 294.

Point 7.

"If Titus write an oration or a poem on a parchment which he obtained wrongfully, the oration or the poem will go with the parchment, even though written by Titus."

Justinian, de Scripta

896 Point 8.

"Our law, like the Roman law, treats those who expend money or labor upon property wrongfully taken by them, as volunteer servants of the owner. So far the authorities, both English and American, seem to be harmonious, and in accord with the civil law. Year Book, 5 Hen. VII, Folio 15; 2 Bl. Com. 404; 2 Kent Com. 363; Betts v. Lee, 5 Johns. 348; Baker v. Wheeler, 8 Wend. 505; Silsbury v. McCoon, 3 N. Y. 379; Guckenheimer v. Angevine, 81 N. Y. 397."

Baker v. Hart, 52 Hun. 365.

Point 9.

To a party whose title originated in fraud or otherwise wrongfully, no compensation for improvements and the discharge of incumbrances, ever is allowed.

Morrison v. Robinson, 31 Pa. 456.
Van Horne v. Fonds, 5 Johns Ch. 388, 416.
Russell v. Blake, 2 Pick. 505.
McKim v. Moody, 1 Rand. (Va.) 58.
Morris v. Terrill, 2 Rand. (Va.) 6.

Point 10.

There is no case "decided in England, Ireland or the United States, grounded upon common law principles, declaring an occupant of land, without a special contract, is entitled to payment for his improvements as against the true owners, when the latter have not been guilty of fraud in concealing the title."

Heron, Hist. Jurisprudence, p. 715.

897 Point 11.

Certainly the appellants, unless they did so as forced trustees, and in their right as cestuis que trust, did not bring the trust estate into court in this suit because, on the appellees' final trial court theory which they procured the trial court to adopt, the appellants were by the judgment of the court held to be without an interest and were enjoined from asserting an interest. Certainly the nominal trustee joining with its creditor did not bring the trust estate into court in this cause because the nominal trustee could not sue itself. Upon the record and judgment therefore we have the trust estate, in its absence from court mulcted in a large sum which upon the authorities supra was composed of unlawful claims on the part of the nominal trustee and its co appellee and counter-claimant.

Proposition D. Second Error.

The Act of March 15, 1913 (Acts 1913, p. 850) as amended by the Act of March 5, 1915 (Acts 1915, p. 123) 1 Burns R. S. 343 A, impairs the obligation of contracts by permitting the pleader to substitute for the terms of the contract his own conclusions as to the terms of the contract and the statute forces a joinder of issue for the purposes of trial upon the pleader's conclusions rather than upon the terms of the contract.

To sustain Proposition D, we offer the following points, viz:

898 Point 1.

The obligation of a contract includes both the specific terms of the contract and the laws which attend them and as thus constitute the obligation of a contract, is guaranteed by the Constitution of the United States, which is the supreme law of the land.

Art. I, Sec. 10, Const. U. S.

Art. VI, Const. U. S.

Point 2.

To guarantee the correct and judicial interpretation — the obligation of the contract, which is the basis of this action, the constitution of the state clothed the contract with the right of "due process of law" and the legislature made it imperative that the affected contract should be produced in court and exhibited with the pleadings.

Art. 1, Sec. 12, Const. Ind.

1 Burns R. S. 368.

Point 3.

A contract exhibited with a pleading should control the averments of the pleading.

Harrison Co. v. Lackey, 149 Ind. 10.
Stewart v. Knight & Jillson Co., 166 Ind. 498.
Huber Mfg. Co. v. Wagner, 167 Ind. 98.

Point 4.

Parol evidence should not be admitted to vary the terms of a written instrument.

Rooker v. Fidelity Trust Co., 185 Ind. 172.

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Point 5.

When an exhibit is contained in a special finding, the exhibit should control the terms of the special finding and the judgment should follow the findings.

1 Burns R. S. 577.
Smith v. Brand, 64 Ind. 427, 430.
Buchanan v. Berkshire etc. Co., 96 Ind. 535.
Conant v. Bank, 121 Ind. 323.
Indianapolis etc. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville, etc. R. Co., 143 Ind. 579, 614-634.
Lowe v. Turpie, 147 Ind. 652.

Point 6.

In an action on a contract the pleading should disclose a breach of the contract whereby the party asserting the right was aggrieved, because the courts are only open that "every man, for injury done him in his person, property or reputation shall have remedy by due course of law."

Const. Ind., Art. I, Sec. 12.
Gallup v. Schmidt, 154 Ind. 196, 202.

Point 7.

The Act of March 15, 1913 (Acts 1913, p. 850) as amended by the Act of March 5, 1915 (Acts 1915, p. 123) 1 Burns R. S. 343*a*, specifically authorizes conclusions to be pleaded in the place and stead of facts, and requires issues to be joined on such conclusions. Nor *it is* a cure of the evil in the law that the statute makes it possible to require the complaint to be made more specific, etc., because the right of the pleader to set forth conclusions authorizes the court to exercise a discretion in respect of those conclusions which
900 may be in contravention of the contract. In the instant case the appellees' joint cross-complaint pleaded the false conclusions that upon the facts stated, which included an exhibit of the trust contract, there had been performances by appellees, default by

appellants and therefore that there was a cause of action in the appellees. These false conclusions of the pleader stood despite motions to strike out (Ante 159-163) to make more certain and specific (Ante 163-167); also demurrers (Ante 167-182). These false conclusions of the pleader entered into the special findings as a fact and they stood, notwithstanding the presence of the trust agreement, despite motions of appellants for judgment in their favor on the special findings (Ante 182-183). These false conclusions of the pleader entered into the conclusions of law and they stood despite the exceptions of these appellants, as plaintiffs, to the conclusions of law (Ante 183-184). These false conclusions of the pleader entered into the judgment and they stood despite the motions to modify the judgment. (Ante 184-193). These false conclusions of the pleader became finally conclusive of the rights of the parties despite the motions of appellants, as plaintiffs, for a new trial of the cause. (Ante 193-217). The fatal vice of the statute is that it removes the obligation from the terms of the contract and plants it in the judicial discretion, despite the principle that courts do not create contracts but only enforce them. The statute therefore imposes on appellants as a vital element of this appeal, the duty to determine the accuracy of the court's action in respect of the conclusions pleaded, rather
901 than the accuracy of the court's action in respect of the terms of the affected contracts.

McClellan v. Coffin, 92 Ind. 463.
Naltner v. Tappy, 55 Ind. 107.
Stewart v. Knight etc. Co., 167 Ind. 98.
Conant v. Bank, 121 Ind. 323.
Indianapolis etc. R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. Co., 143 Ind. 579, 514-634.
Stenzel v. Boyce, 143 Ind. 642, 646.
Harrison Building etc. Co. v. Lackey, 149 Ind. 10, 14.
Lowe v. Turpie, 147 Ind. 652.
Globe etc. Co. v. Reid, 19 Ind. App. 203, 212.
Perkins v. Hayward, 124 Ind. 445, 450-451.
Harrison Tp. v. Addison, 176 Ind. 386, 396.

Point 8.

After the appellees elected to stand upon the exhibits pleaded, as they did stand, unless the countervailing statute could and did substitute the pleader's conclusions in the place and stead of the obligation of the contract, then no evidence should have been admissible which would change, alter or vary the terms of the instruments pleaded, and by those instruments the appellees must now stand or fall unless the state defeats the contracts.

Conant v. Bank, 121 Ind. 323.
Indianapolis etc. R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. R. Co., 143 Ind. 579, 614-634.
Rooker v. Fidelity Trust Co., 182 Ind. 175.

Point 9.

The findings of maturity, default and the right of judgment are not sustained by the instruments pleaded and therefore should be disregarded as being outside of the issues, unless the conclusions of the pleader are, by the terms of the statute, made to displace
902 the terms of the contract. In the event the conclusions of the pleader displaced the terms of the contract then we were to try the cause on the issue of what the pleader said the contract was rather than on the issue of what the contract by its own terms declared itself to be according to the fixed rules of judicial interpretation and construction.

Cruzan v. Smith, 41 Ind. 288, 295.
Boardman v. Griffin, 52 Ind. 101.
Naltner v. Tappy, 55 Ind. 108.
Thomas v. Dale, 86 Ind. 435.
Brown v. Will, 103 Ind. 71.
Willis v. Crowder, 134 Ind. 515.
Citizens Bank v. Judy, 146 Ind. 322.
Lowe v. Turpie, 147 Ind. 652.
Reynolds v. Louisville, etc. Co., 143 Ind. 576, 621.
Harrison, etc. Co. v. Lackey, 149 Ind. 10, 14.
Talbott v. English, 156 Ind. 299, 315.
Indianapolis etc. R. Co. v. Houlihan, 157 Ind. 494, 506.
Stewart v. Knight etc. Co., 166 Ind. 498.
Huber Mfg. Co. v. Wagner, 167 Ind. 98.

Point 10.

As the case stood the appellants had executed with the Fidelity Trust Company as trustee, the trust agreement. The terms of the agreement were its consideration. The agreement was by its terms to be performed in pais. There was no obligation imposed on the appellants but they had rights which commanded protection. Having no obligation to perform the appellees had no obligation which they could default. Having no capacity for default the appellants were without capacity because of default, to create the maturity of any obligation on their part to be performed or to create any right in the appellees. Because of this situation the appellees directed their various motions and demurrers to the counter claim. These motions and demurrers had elements of similarity. But the
903 court accepted what the appellees said about the trust agreement rather than what the trust agreement said about itself; and thus the cause came to be tried upon the conclusions of the pleader rather than upon the terms of the contract as given in its own words.

Ante, Motions to Strike Out, 159-163;
Ante, Motion to Make More Specific, 163, 167;
Ante, Demurrers with Memoranda, 167, 182.

Point 11.

A case tried upon a complaint which does not state a cause of action cannot result in a special finding which will be sufficient, because a special finding can be no broader than the complaint under the familiar rule that a special finding must be within the issues.

Davis v. Franklin, 25 Ind. 407, 408.
Kealing v. Vansickle, 74 Ind. 529, 535.
Perkins v. Hayward, 124 Ind. 445, 450-1.
Durflinger v. Baker, 149 Ind. 375, 378.
Talbott v. English, 156 Ind. 299, 315.
Cook v. Board, 175 Ind. 215, 224.
Harrison Tp. v. Addison, 176 Ind. 386, 396.

Point 12.

After the appellee elected to stand upon the exhibits pleaded, and it was an election so to stand when the appellee prevailed upon the court to overrule the appellants' demurrers and motions to make more specific, etc., then no evidence should nor would be admissible which would change, alter or vary the instruments pleaded, and by those instruments the appellee must now stand or fall, unless the statute (1 Burns R. S. 343) prevails to allow the obligation of the contract, which is its consideration, to be impaired by the judicial imposition of "conclusions" to which as terms of the contract the affected parties never have given their consent.

Conant v. Bank, 121 Ind. 323.
Indianapolis R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville, etc. R. Co., 143 Ind. 579, 614-34.

Point 13.

The instruments at issue are set out ipsissimus verbis in the special findings and they should have controlled it as they should have and would have controlled the counter-claim, except as the statute (1 Burns R. S. 343*a*) impaired the obligation of the contract by destroying its consideration. The obligation of a contract, within the meaning of the constitutional provision against impairment, depends upon its terms and the means which the law in existence at the time affords for its enforcement. Validity and remedy are both parts of the obligation and are guaranteed by the constitution against impairment. When the court in this case, adopting the conclusions of the pleader pursuing the statute (1 Burns R. S. 343*a*), held that the appellants were without right to enforce the performance of the trust agreement, then and thereby the court held that there was no person competent and qualified to enforce the performance of the contract. This constituted impairment and

the statute supra which pretended to authorize such procedure fell within the inhibition of the constitution.

McCracken v. Hayward, 2 How. 608; 11 Law Ed. 397.
Walker v. Whitehead, 16 Wall. 314; 21 Law Ed. 357.
Murray v. Charleston, 96 U. S. 432; 24 Law Ed. 760.

Point 14.

The independence of the judiciary from legislative control
905 in the matter of interpretation comprises a part of the obligation of a contract. While it may be admitted that the legislature may prescribe statutory definitions for the purpose of a statutory right—for example the legislature may define a statutory mechanic's lien—but the legislature, nevertheless, is without power to tell the judiciary the meaning of words in a contract, and, likewise, the legislature is without power to authorize any other person to tell the judiciary the meaning of words. To illustrate the many bearings which this principle affecting the independence of the jury has in the instant case the statute authorized the pleader to state as a conclusion binding on the court that the appellee had performed "all conditions of said contracts on its part to be performed" (Ante, p. 79); also, "That said cross-complaint has fully and duly performed all of the conditions on its part to be by it performed." (Ante, p. 95).

Point 15.

If the legislature can require courts to accept a pleader's conclusions in lieu of facts, then the legislature can require courts to give an effect to contracts which will defeat the intentions of the parties who made the contracts. If the legislature can require the courts to defeat the expressed intention of the parties to a contract, then the legislature can require courts to change and modify contracts. If the legislature can require courts to change and modify contracts then the legislature can require the courts to deny
906 altogether the right to contract. The inviolability of contract clauses of the constitution restrains such power in the legislature.

McClelland v. Coffin, 93 Ind. 465.

Point 16.

The trend of the law is to allow the utmost liberty in contracting. It repeatedly has been held that parties may stipulate that the laws of a state or country other than the one wherein the contract is made, shall govern its interpretation and remedy both as to the rights and duties of the parties on the one hand and as to their remedies in case of a breach on the other hand. The law of the contract is a part of its obligation.

McAllister v. Smith, 17 Ill. 328, 334.
Union Nat'l Bank v. Chapman, 169 N. Y. 538, 545.

Grand v. Livingston, 1 App. Div. 589, 593, 596, affirmed 158 N. Y. 688.
Dike v. Erie Ry. Co., 41 N. Y. 113, 116.
Le Breton v. Miles, 8 Paige 261.
Green v. Poole, L. R. 5, Q. B. D. 272.
Cohen's Commercial Arbitration and the law 16, 217.
Liverpool etc. Co. v. Phœnix Ins. Co., 129 U. S. 397, 445; 32 Law Ed. 788, 798.
Cochlan v. So. Carolina R. Co., 142 U. S. 101; 35 Law Ed. 951, 954.
Pinney v. Nelson, 183 U. S. 146; 46 Law Ed. 125.

Point 17.

Parties may by stipulation waive their right to appeal.
Townsend v. Masterson, 15 N. Y. 587.
Ogdenburgh etc. R. Co. v. V. etc. R. Co., 63 N. Y. 176.
Godfrey v. Moser, 66 N. Y. 250.
Riggs v. C. etc. Ins. Co., 125 N. Y. 7.
Palmer v. Lavers, 218 Mass. 286; 105 N. E. 1000.
Hoste v. Dalton, 137 Mich. 522.
Watson v. Wetter, 91 Pa. 385.

907 Point 18.

There is strong authority for the legal proposition that parties may select the courts in which the case is to be tried in the event of controversy. Judge Parker in La Greve v. Aetna etc. Co., 81 Hun. 28, 30, said: "The suggestion that the court should resent this attempt to oust it of jurisdiction is unworthy of extended notice."

Point 19.

Jessel, M. R., in Peinting etc. Co. v. Sampson, L. R. 19 Eq. 462, 465, said: "* * * if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

Point 20.

Judge Earl in re New York etc. R. Co., 98 N. Y. 447, 453, said: "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties which not only binds them, but which the courts are bound to enforce."

Point 21.

The parties to a contract may require the commencement of an action within a period shorter than prescribed by the statute
908 of limitations.

Erie etc. R. Co. v. Stone, 98 N. Y. 447, 453.
Ames v. New York etc. Ins. Co., 14 N. Y. 253, 262.
Ripley v. Aetna Ins. Co., 30 N. Y. 136, 163.
Roach v. New York etc. Co., 30 N. Y. 546.
Mayor etc. v. Hamilton etc. Co., 39 N. Y. 45.
Williams v. Fire Assn'n etc. (N. Y.), 119 App. Div. 573.
Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386 and cases cited.
Fulham v. New York etc. Ins. Co., 7 Gray 61.

Point 22.

The parties to a contract may limit their liability for negligence.
Anderson v. Erie R. Co., (N. Y.) 171 App. Div. 687.

Point 23.

They may settle controversies on terms which do not affect a general release of liability.
Parry Mfg. Co. v. Crull, 56 Ind. App. 77.

Point 24.

The parties to a contract may provide an exclusive form of remedy which the courts will enforce.
Hickman v. Sawyer, 246 Fed. 284 and cases cited.

Point 25.

In the instant case the parties agreed upon a ritual of procedure. Mrs. Rooker was undertaking to liquidate her estate. Time was of the essence of the contract and the prescribed method was its consideration. Instead of performing the trust agreement the appellees devoted many years of earnest endeavor to acquiring, and
909 they did acquire by proceedings adversary to the trust, the legal title to the trust property. All these principles of the trust agrement became the settled law of this case on the former appeal, and the facts appear uncontroverted in this record. Notwithstanding this situation the statute (1 Burns 343*a*) allowed the appellees to destroy the law of the case, to destroy the obligations of the contract and to disregard the unlawful conduct in pais of the appellees, by their making the averment of a conclusion of full and due performance, obligatory on the court to the exclusion of every fact and of every principle of jurisprudence, including the settled

law of the case as fixed on the former appeal. This result, we contend, impaired the obligation of the contract.

Point 26.

The legislature can neither perform judicial functions nor enforce them upon the people through the medium of a subordinate judiciary.

Cooley's Const. Lim. (6th Ed.) 113-115.

Point 27.

This rule is illustrated in fact by the Constitution of Indiana which provides in its bill of rights: "All courts shall be open; and every man, for injury done him in his person, property or reputation shall have remedy by due course of law. At the time the affected trust agreements were written it became, as it is of course now, an engagement in the obligation that "due course of law" should attend the remedies sought in an action on the
910 contract. The legislature therefore could not cut down or limit the "due process of law." Any function in that respect was judicial and not legislative.

Const. Ind. Art. I. Sec. 12.

Point 28.

Where the constitution imposes a duty or protects a right the legislature can neither enlarge the duty nor impair the right. If that could be done, then the legislature could by statute amend the constitution.

Ex Parte France, 176 Ind. 72.
Curless v. Watson, 180 Ind. 86.

Point 29.

This act of the general assembly is a species of recall of judicial opinion.

Domestic Block Coal Co. v. De Arney, 179 Ind. 592.

Point 30.

The recall of judicial opinion is not authorized in Indiana. It exists in England because the House of Lords is both a part of the Parliament and the supreme judicial tribunal. It has, therefore, both political and legislative power on the one hand and judicial power on the other. At one time, if not now, the royal prerogative embraced the right of recall of judicial opinion. This power was exercised sparingly and its utmost notable instance, perhaps, was when the attempt of Lord Coke to destroy the lex Mercatoria was challenged by Lord Mansfield, who sought to preserve the lex

Mercatoria as in the equity jurisprudence. The royal pre-
911 rogative sustained Lord Mansfield and thereafter instruments not under seal, as notes and bills of exchange, were freely admitted to a place as the basis of suits for judicial redress. Thus again the statute of 4 Anne. Chap. 16. Sec. 12, "An act for the Amendment of the law and the better advancement of justice," was employed to prevent the expansion of Lord Holt's opinion in Clarke v. Mundall (Martin?) 1 Salk. 124 S. C., to the effect that on the date of maturity of a bill there could be no accord and satisfaction if payment were made in money of less value from the face of the note, though such accord and satisfaction might be accomplished if the payment were made with a horse or any other subject of property else than money. (Cranch: "Promissory notes before and after Lord Holt.) In the Federal government where the congress is given control over specific property an act of Congress may recall a judicial opinion which affects such property. There the recall traces not to the power of the Congress over jurisdiction of the judiciary as the rule is in England, but to the power of the Congress over the subject of that judicial opinion.

State of Pennsylvania v. Wheeling, etc. Co., 18 How. 421.

Point 31.

But the senate is without the judicial power possessed relatively by the House of Lords.

Kilbourn v. Thompson, 103 U. S. 166; 26 Law Ed. 377.

Point 32.

Under our constitution the legislature may define a court's
912 jurisdiction of causes. But that power does not involve the independence of the judiciary once created to employ the common language of the people as that language is spoken, nor to direct the interpretation and construction of contracts. The rule is that where power is lodged to hear and determine the authority thus created will not be abridged by a restriction in the use of words so defined as to transgress the meaning of the common language of the people.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294.
Galveston etc. v. Texas, 210 U. S. 217, 227.
St. Louis etc. Co. v. Arkansas, 235 U. S. 350, 362.
Kansas City v. Kansas, 240 U. S. 227, 231.
Mountain etc. v. Washington, 243 U. S. 219.

Point 33.

In Indiana the judicial and the legislative powers are segregated by Art. III of the Constitution. The legislature clearly is without power to impose terms or conditions upon the judicial interpretation and determination of contracts, and in so far as the act assumes to bind a court by the conclusions of a pleader in the interpretation of

a contract the act is in conflict with both the Federal Constitution as to the due process clause, the equal protection of the laws clause, the contract clause and it contravenes also the Constitution of Indiana, Art. III, and Sec. 12 of Art. 1."

And appellants say that the Supreme Court of Indiana denies to appellants and to each of them a hearing and consideration of said federal questions on the sole ground that the statement of them is confused with argument, whereas the Supreme Court of the
913 United States has declared the rule to be the federal question is presented if it be distinctly made at the proper time.

Wherefore, appellants and each of them pray that there be granted to them a rehearing of this cause and that upon such rehearing the judgment of the Hamilton Circuit Court be in all things reversed, and they pray for all proper relief.

Prayer for Reversal.

Wherefore, and upon consideration of the several errors assigned, and because of the numerous errors apparent upon the face of the record, all to the wrongful prejudice of these plaintiffs in error, they humbly pray that the judgment of the Supreme Court of Indiana and the judgment of the Hamilton Circuit Court of Indiana be in all things reversed, and that plaintiffs in error be awarded all proper relief.

WILLIAM V. ROOKER,
Attorney for Plaintiffs in Error.

IRA W. CHRISTIAN,
FLOYD G. CHRISTIAN,
RALPH H. WALTZ.

914 [Endorsed:] Original. In the Supreme Court of Indiana. No. 23598. November Term, A. D. 1921. Dora E. Rooker, William V. Rooker, Appellants, v. Fidelity Trust Company, in its Corporate Capacity Proper, Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Appellees. Assignment of Errors with Petition for Writ of Error. Filed Dec. 14, 1921. Patrick J. Lynch, Clerk.

915 And on the same day the following further pleas and proceedings were had in said court, in said cause:

Come now the appellants by counsel, and file *its* bond on writ of error from the Supreme Court of the United States in the penal sum of One Thousand Dollars ($1,000.00) which bond is now taken and approved, by Honorable Louis B. Ewbank, Chief Justice, a copy being hereto next below attached, and being as follows:

In the Supreme Court of Indiana.

Cause #23598.

DORA E. ROOKER et al., Appellants,

vs.

FIDELITY TRUST COMPANY et al., Appellees.

Bond on Writ of Error.

Know all men by these presents: That we, Dora E. Rooker and William V. Rooker, as Principals and New Amsterdam Causualty Company, of New York, as Surety, are held and firmly bound unto Fidelity Trust Company, of Indianapolis, Indiana, and Fidelity Trust Company, Trustee of the Estate of Dora E. Rooker in the penal sum of one thousand ($1,000) dollars, to the payment of which, well and truly to be made we bind ourselves, our heirs, executors, administrators and successors firmly by these presents.

Whereas, a citation has been issued on a writ of error granted by the Honorable Louis B. Ewbank, Chief Justice of the Supreme Court of Indiana, to bring up from the Supreme Court of Indiana, for examination and judgment by the Supreme Court of the United States, a transcript of the record, proceedings and judgment of the Supreme Court of Indiana in Cause No. 23598 in said Court, wherein the said Dora E. Rooker and William V. Rooker are appellants and the Fidelity Trust Company in its coroporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker are appellees;

Now the condition of the above obligation is such that if the said Dora E. Rooker and William V. Rooker shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then this obligation to be void, else to remain in full force and effect.

916 Given under our hands and seals at the City of Indianapolis, in the State of Indiana, this 14th day of December, 1921.

(Signed) DORA E. ROOKER.
WILLIAM V. ROOKER.
[SEAL.] NEW AMSTERDAM CASUALTY COMPANY,
By DAVID LAYTON,
Attorney-in-Fact.

Dec. 14th, 1921.

Approved.
LOUIS B. EWBANK,
C. J.

(Endorsed:) Filed Dec. 14, 1921. Patrick J. Lynch, Clerk.

917 And afterwards, towit: On the 15th day of December, 1921, being the 16th Judicial day of the November Term, 1921, of said Supreme Court, the following further pleas and proceedings were had in said court in said cause:

Come now the appellants by counsel, and file a writ of error from the Supreme Court of the United States to the said Supreme Court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

918 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the Judges of the Supreme Court of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said Supreme Court, before you, between, Dora E. Rooker and William V. Rooker and Fidelity Trust Company in its corporate capacity proper, and Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, a manifest error hath happened, to the great damage of the said Dora E. Rooker and William V. Rooker, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and the seal of said District Court, this 14th day of December A. D. 1921.

[Seal of District Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk of the District Court of the United States for the District of Indiana.

Copy of above writ for the defendant in error lodged in the Clerk's Office of the Supreme Court of Indiana on the — day of ——, 19—.

In obedience to the above writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the above entitled cause, this — day of ——, A. D. 19—.

Clerk of the Supreme Court of Indiana.

[Endorsed:] No. —. District Court of The United States for the District of Indiana. Dora E. Rooker and William V. Rooker Plaintiff- in Error vs. Fidelity Trust Company and Fidelity Trust Company, Trustee, Defendants in Error. Writ of Error to the Supreme Court of the United States. Filed Dec. 15, 1921. Patrick J. Lynch, Clerk.

And afterwards, towit: On the 17th day of December, 1921, being the 18th Judicial day of the November Term 1921, of said Supreme Court, the following further pleas and proceedings were had in said court, in said cause:

Come now the appellants by counsel, and file their citation on said writ of error, duly signed by the Honorable Louis B. Ewbank, Chief Justice of said Supreme Court, and proof of service of the citation on the defendant in error, said citation and proof of service thereof being hereto next below attached, and being as follows:

In the Supreme Court of Indiana.

No. 23598.

DORA E. ROOKER, WILLIAM V. ROOKER, Appellants,

vs.

FIDELITY TRUST COMPANY, in Its Corporate Capacity Proper; Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, Appellees.

Citation.

To the appelles, and each of them, above named:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on Monday the 23rd day of January, A. D., 1922, pursuant of an order allowing a writ of error filed and entered in the Clerk's office of the Supreme Court of Indiana in the cause above entitled, from a final judgment and decree signed, filed and entered on the 12th day of October, A. D., 1921, in which cause Dora E. Rooker and William V. Rooker are appellants and you are the appellees to show cause, if any there be, why the judgment and decree rendered against the said appellants, as in said order allowing said writ of error mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Louis B. Ewbank, Chief Justice of the Supreme Court of Indiana, this 17 day of December, A. D., 1921 1921, and of the Independence of the United States 145.

LOUIS B. EWBANK,
Chief Justice Supreme Court of Indiana.

Received copy of the above citation this 17th day of December, 1921.

CHARLES E. COX,
Attorney for Appellees.

922 [Endorsed:] No. 23598. In the Supreme Court. Dora E. Rooker et al. v. Fidelity Trust Co. et al. Citation. Filed Dec. 17, 1921. Patrick J. Lynch, Clerk. W. V. Rooker, Appellants' atty.

923 And afterwards, to wit: On the 19th day of December, 1921, being the 18th Judicial day of the November Term, 1921, of said Supreme Court, in said cause:

Come now the appellants by counsel and file copy of writ of error for defendants in error, said copy of writ of error thereof being hereto next below attached, and being as follows:

924 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said Supreme Court, before you, between Dora E. Rooker and William V. Rooker and Fidelity Trust Company in its Corporate Capacity Proper and Fidelity Trust Company as Trustee of the Estate of Dora E. Rooker, a manifest error hath happened, to the great damage of the said Dora E. Rooker and William V. Rooker, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and the seal of said District Court this 14th day of December, A. D. 1921.

[SEAL.] NOBLE C. BUTLER,
Clerk of the District Court of the United States for the District of Indiana.

925 Copy of above writ for the defendant in error lodged in the Clerk's Office of the Supreme Court of Indiana on the — day of ——, 19—.

In obedience to the above writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the above entitled cause, this — day of —, A. D. 19—.

———,
Clerk of the Supreme Court of Indiana.

STATE OF INDIANA, *ss:*

Supreme Court.

I, Patrick J. Lynch, Clerk of the Supreme Court of Indiana do hereby certify that the above and foregoing is a true and complete copy of the original writ of error lodged in this court on December 15, 1921.

In witness whereof, I hereunto set my hand and affix the seal of said Court, at the City of Indianapolis, this 15th day of December, 1921.

[SEAL.] PATRICK J. LYNCH,
Clerk S. C.

(Endorsed:) No. —. District Court of The United States for the District of Indiana. Dora E. Rooker and William V. Rooker, Plaintiff in Error vs. Fidelity Trust Company and Fidelity Trust Company, Trustee, Defendant in Error. Writ of Error to The Supreme Court of the United States. Filed Dec. 15, 1921. Patrick J. Lynch, Clerk.

926 And afterwards, to wit: On the 22nd day of December, 1921, the same being the 22nd Judicial day of the November Term, 1921, of said Supreme Court, the following further pleas and proceedings were had in said cause:

Come now the appellants by counsel and file præcipe for Transcript with proof of notice thereof being hereto next below attached, and being as follows:

927 In the Supreme Court of Indiana

No. 23598.

DORA E. ROOKER et al., Appellants,

vs.

FIDELITY TRUST COMPANY et al., Appellees.

To the Hon. Patrick J. Lynch,
The Clerk of the Supreme Court of Indiana:

You will please make out and certify over your hand and the seal of said court a copy of the following portions of the record in the cause above entitled, for the purposes of a writ of error to the Supreme Court of the United States, namely:

1. The entry of filing of transcript on appeal from the Hamilton Circuit Court of Indiana, together with the præcipe for notice of said appeal to the appellees, said notice and the return of service thereof and the assignments of error thereon.

2. A transcript of the record of the Hamilton Circuit Court in said cause.

3. The order of submission of said cause to the Supreme Court of Indiana.

4. The entry of judgment of the Supreme Court of Indiana.

5. The petition for a rehearing in the Supreme Court of Indiana.

6. The entry of ruling on the petition for rehearing.

7. The petition for writ of error to the Supreme Court of the United States; the assignments of errors filed therewith; the entry of order allowing the writ of error; the entry of filing of the
928 bond thereon and a transcript of said bond; a transcript of the writ of error; a transcript of the entry showing copy of the writ of error for defendants in error lodged in your office; the entry of the filing of citation to the appellees and a copy thereof, with acknowledgment of service. The entry of filing this præcipe and a transcript thereof.

And upon the making of said transcript you will attach your certificate as provided by law, over your hand and the seal of said court.

W. V. ROOKER,
Attorney for Appellants.

The appellees will take notice that on Thursday the 22nd day of December, 1921, at 11 o'clock A. M. the appellants will file in the office of the clerk of the Supreme Court of Indiana, at the capitol in the City of Indianapolis, their præcipe as above set forth for a transcript of the record of said cause for the purposes of writ of error in said cause out of the Supreme Court of the United States.

W. V. ROOKER,
Attorney for Appellants.

Received copy of the foregoing notice and præcipe this 21 day of December, 1921.

CHARLES E. COX,
Attorney for Appellees.

929 [Endorsed:] No. 23598. In the Supreme Court. Dora D. Rooker et al. v. Fidelity Trust Co. etc. et al. Præcipe for Transcript and Notice Thereof. Filed Dec. 22, 1921. Patrick J. Lynch, Clerk. W. V. Rooker, Appellants' Atty.

930 STATE OF INDIANA:

In the Supreme Court.

I, Patrick J. Lynch, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record of the proceedings had, papers filed, motions decided, rulings made, opinions made, orders entered and judgment rendered in the Supreme Court of Indiana in cause No. 23598, Dora E. Rooker and William V. Rooker vs. Fidelity Trust Company in its Corporate Capacity Proper, Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker, also the original petition for the allowance of the writ of error, the original writ of error from the Supreme Court of the United States to the Supreme Court of Indiana, with the allowance thereof; the original citation to the defendant in error and proof of service thereof; a copy of the bond and its approval by the chief justice of said Supreme Court of Indiana, and the assignment of errors in the Supreme Court of the United States, together with the original praecipe for transcript of record with proof of notice thereof, which I hereby certify as and for my full return to said writ of error:

In witness, whereof, I hereto set my hand and affix the seal of said Supreme Court, at the City of Indianapolis, this 10th day of January, 1921.

[Seal of the Supreme Court, State of Indiana.]

PATRICK J. LYNCH,
Clerk of the Supreme Court of Indiana.

Endorsed on cover: File No. 28,740. Indiana Supreme Court. Term No. 785. Dora E. Rooker and William V. Rooker, plaintiffs in error, vs. Fidelity Trust Company and Fidelity Trust Company as trustee of the estate of Dora E. Rooker. Filed February 28, 1922. File No. 28,740.

FEB 9 1923
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 285

DORA E. ROOKER, WILLIAM V. ROOKER,
Plaintiffs in Error.

v.

FIDELITY TRUST COMPANY, IN ITS CORPORATE CAPACITY PROPER,

FIDELITY TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER,
Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR

WILLIAM VELPEAU ROOKER,
Attorney for Plaintiffs in Error.

FLOYD G. CHRISTIAN,
RALPH H. WALTZ,
Of Counsel.

Indianapolis, Ind., January 15, 1923.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 285

DORA E. ROOKER, WILLIAM V. ROOKER,
Plaintiffs in Error.

v.

FIDELITY TRUST COMPANY, IN ITS CORPORATE CAPACITY PROPER,

FIDELITY TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER,
Defendants in Error.

STATEMENT OF THE CASE.

This is a writ of error to review a record in which the Supreme Court of Indiana rendered two conflicting opinions, thereby impairing the obligation of the contract at issue, denying the equal protection of the law and taking property without due process.

The case in which these conflicting judgments were rendered was a suit to redeem a trust estate from a recalcitrant trustee who had repudiated the trust and renounced the office of trustee.

The first of these conflicting judgments of the Su-

preme Court of Indiana was an appeal from the Hamilton Circuit Court and reversed the judgment rendered below.

The second judgment was rendered on the mandate of the Supreme Court, and it affirmed on appeal the Hamilton Circuit Court, whose judgment was in contravention of the mandate upon which the circuit court had jurisdiction.

In its first opinion the Supreme Court held that the contract at issue was a trust agreement, and as such was controlled by the law of trusts with Dora E. Rooker and William V. Rooker having the interests and rights of *cestuis que trust*, whose rights had been made actionable by the misconduct of the trustee in repudiating the trust and renouncing the office of trustee.

In its second opinion the Supreme Court held that there was no trust agreement and no contract controlled by the law of trusts, but that there was one of those arrangements known to the law as non-contract, which had an imperfect obligation reposing only in morals and non-enforceable, and that Dora E. Rooker and William V. Rooker were without any interests and without any rights which were actionable, and that an injunction should be entered restraining and enjoining Dora E. Rooker and William V. Rooker from asserting any rights in the litigation and from claiming any interest as *cestuis que trust* in the property of the trust estate.

The federal questions arise (1) upon the face of the record and (2), also, because they were expressly asserted and claimed.

Pending the mandate of the Supreme Court to the Hamilton Circuit Court the Fidelity Trust Company, as trustee of the estate of Dora E. Rooker, appeared in the Marion Circuit Court and there filed a cross-complaint to quiet title in the trustee to the property of

the trust estate. Louis B. Ewbank was at that time judge of the Marion Circuit Court and was, clandestinely, at the same time an inchoate trustee of the estate of one Malott, worth many millions of dollars, and largely invested in the securities of trust companies and banks qualified under the law to act as trustee and to perform such trusts as the one here involved. Ewbank, therefore, had a duty coupled with an interest, to write the law, so as to enlarge the rights of trustees as against their *cestuis que trust* and to restrict, minimize and destroy the actionable rights of *cestuis que trust* against their trustees for malfeasance in office, or to redeem the property of a trust estate from a recalictrant trustee who had repudiated the trust and renounced the office of trustee and had converted the trust property to the sole gain and advantage of the trustee. Under the law of Indiana, interpreting and construing the maxim *nemo debet judex esse in propria sua causa*, a court whose judgment is tainted with the presence of a judge who, because of an interest, is disqualified, is no court at all,: and its adjudication is unlawful and void. Ewbank, the trustee, interested in his duty to sustain and enhance the value of his own holdings in trust companies and banks competent under the law to act as trustee and to perform conventional trusts, such as the one at issue here, and interested also in the perspective career of his own trusteeship, sustained the suit of the trustee, adjudged that Dora E. Rooker and William V. Rooker were without any interests and without any rights which were actionable, and that injunction should be, and it was, entered restraining and enjoining Dora E. Rooker and William V. Rooker from asserting any rights in the litigation and from claiming any interest as *cestuis que trust* in the property of the trust estate. Charles E. Cox, who had been a member of the Supreme Court when the first opinion of that court was

written, but who had been defeated for re-election, came into this case before Ewbank. It is, it seems, the first time in the history of that court that such conduct may be found. Cox's conduct is at least *sui generis*. Ewbank entered a decree restraining and enjoining Dora E. Rooker and William V. Rooker from asserting any interest in the trust estate.

Later the case came on for hearing in the Hamilton Circuit Court upon the mandate of the Supreme Court. Then Cox first appeared in this case in the Hamilton Circuit Court, and he brought with him the Ewbank theory which was presented for the first time after five years of litigation. The introduction of this theory was made with a so-called supplemental counter claim, which, of course, was not a supplemental but an amended pleading, because the defense it assumed to state was not one which had been created or had arisen after the original counter claim was filed. Subsequently, at the trial this same Ewbank theory and the action of the Marion Circuit Court were employed, as will be shown.

The initial pleading filed in the case by the Fidelity Trust Company, asserting an interest and right as trustee, was filed June 30, 1917, the mandate of the Supreme Court having been returned to the Hamilton Circuit Court January 29, 1916, eighteen months earlier. This initial pleading was denominated a second amended counter claim of "Fidelity Trust Company in its corporate capacity proper and as trustee." (Printed Tr., pp. 65-66.) The sole defendants to this joint counter claim were Dora E. Rooker and William V. Rooker. The demand was in behalf of the trust company in its corporate capacity proper for a money judgment against the trust estate and for a decree against Dora E. Rooker and William V. Rooker, restraining and enjoining them from further asserting any interest in the trust estate and adjudging that the

title to the trust estate be quieted in the Fidelity Trust Company as trustee. In theory the trustee and its banker joined in a suit on the banker's claim against the trust estate and named as sole defendants of the trust estate persons who were alleged to be without any interest therein. Plaintiffs in error claim that this pleading *prima facie* did not bring the trust estate before the courts, that upon the adjudication the trust company did not have its day in court, that the proceeding as against the trust estate was *coram non judice* and would have been so upon an initial proceeding and regardless of the mandate, and that the presence of the mandate of the Supreme Court excluded any possibility of the trust estate being in court upon any issue tendered with this so-called second amended counter claim. Judgment went according to this second amended counter claim.

From this second judgment of the Hamilton Circuit Court, this appeal was prosecuted to the Supreme Court. The appeal presented the issue that the first opinion and judgment had fixed the law of the case to be that the contract at issue was a trust agreement, and as such was controlled with the law of trusts; that the law thus declared was the law of the state in respect of this contract; that the law thus declared entered into and became the obligation of the trust agreement; that the state having in this manner ascertained, fixed and determined the obligation of the contract could not thereafter contravene the law of the case; that the first opinion and judgment embraced everything which could possibly become a justiciable issue in respect of this contract, and therefore left nothing open for further judicial inquiry; wherefore, the second judgment of the Hamilton Circuit Court was without subject matter upon which it could function, and therefore was *coram non judice* and void; that an accounting could not be had against the trust

estate where the trustee and its banker as a creditor joined against the *cestuis que trust* upon an issue that the *cestuis que trust* were without any interest in the property of the trust estate and without any right in the litigation, because if these charges against the *cestuis que trust* were true, then the trust estate was without a defendant and its property was being taken without its day in court and without due process of law, and in denial of the equal protection of the law; that the judgment at issue was not only in contravention of the law of the case as fixed on the first appeal, but, further, it was a judgment which the trustee was by deed estopped to seek; that the judgment was rendered upon a record which estopped the counter claimants who, in contravention of the trust agreement, had acquired title to all the trust property in denial of the trust; that the trustees had come in without regard for the principle of *locus poenitentia* and upon the record was estopped to deny the controlling influence of that principle of equity; that this proceeding was in itself a repudiation of the trust agreement and a renunciation of the office of trustee as fixed by the contract and determined forever on the first appeal; that therefore the issue adjudicated was not germane to the jurisdiction of the court under the mandate, and that no lawful counter claim could be written on any such issue as the counter claim pretended to set forth.

Pending this appeal, Judge Lawson M. Harvey, of the Supreme Court, died. Ewbank was appointed to fill the vacancy in the Supreme Court. When this appeal came on for hearing in the Supreme Court, Ewbank sat at the oral argument and he participated in the decision. The judgment of the Hamilton Circuit Court was affirmed with an opinion which contravenes the first opinion and judgment, denies both the existence and potency of well fixed principles of substantive law and procedure and turns these plaintiffs in

error out of court without their property, without compensation for their property and without redress for any of the wrongs they have suffered.

After the rendition of this second opinion and judgment of the Supreme Court of Indiana, said testator Malott died. Upon the probate of the will of said decedent it was disclosed for the first time to Dora E. Rooker and William V. Rooker that said Ewbank, during all said proceedings in said Marion Circuit Court and thereafter in said Supreme Court, had been and was an inchoate trustee of said Malott estate for a period to continue hereafter for a term, to-wit, twenty-four years, and that said Ewbank in the premises had an official duty and a personal interest in having the laws of Indiana so written as to enlarge the rights of trustees as against their *cestuis que trust* and to restrict, minimize and destroy the actionable rights of *cestuis que trust* against their trustees for malfeasance in office.

Upon these disclosures of the duties, interests and disqualifications of said Ewbank, Dora E. Rooker and William V. Rooker, in the exercise of a statutory right, filed their petition for a rehearing, wherein, among other things, they set up that said opinion and judgment was unlawful because of the participation of said Ewbank, and they claimed the protection of the Constitution of the United States against the denial to them of the equal protection of the law and against the taking of their property without due process of law. These claims upon the Constitution of the United States were set up also, in the assignment of errors presented to the Supreme Court of Indiana, at the time this writ of error was allowed. The petition for a rehearing being overruled, this writ of error was sued out, a supersedeas bond was given, a copy of the writ of error was lodged in the clerk's office of the Indiana Supreme Court for the defendants on error,

the proper citation was made, served and returned and the proceedings on the writ perfected according to law.

Pending the jurisdiction of this court, the defendants in error have, upon proceedings in the Hamilton Circuit Court, taken possession of property of the trust estate, have committed waste thereon, and they now have pending in the Hamilton Circuit Court a petition for a writ of assistance to dispossess Dora E. Rooker and William V. Rooker of their home, solely upon the pretended authority of the judgment herein sought to be reviewed.

While Dora E. Rooker and William V. Rooker were engaged with all possible diligence in preparing the records essential to suing out this writ of error, the defendants in error instituted in the Hamilton Circuit Court a proceeding to commit Dora E. Rooker and William V. Rooker to prison on the ground that they were guilty of contempt of said Hamilton Circuit Court in continuing to assert rights in this litigation and interests in the trust estate by seeking this appellate review of their cause in the Supreme Court of the United States.

In the premises the defendants in error are now in contempt of this court.

CHRONOLOGY OF EVENTS WHICH LED TO THIS SUIT.

Perhaps it may be serviceable to the court to have a summary of the events involved which preceded this suit put in chronological form. Therefore, we submit the following:

THE TRUST AGREEMENT.

On October 11, 1909, Dora E. Rooker and William V. Rooker, as first parties, and Fidelity Trust Company, as second party, entered into the affected trust agreement and executed as evidence of such contract the fol-

lowing memorandum in writing (omitting the formal parts), to-wit:

"Witnesseth:

"Paragraph 1. That concurrently herewith and as a part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed conveyed to second party as trustee, ever upon the conditions and trust and upon the powers and for the uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, to-wit: (Here follows description of same.) Also the following real estate in Hamilton County, in the State of Indiana, to-wit: (Here follows description of same.) That reference is hereby made to the said warranty deeds and to the several descriptions therein for greater certainty.

"Paragraph 2. That said warranty deed is made ever upon the conditions and trust and upon the powers and for the uses and purposes herein more particularly set forth, that is to say: Whereas the said Dora E. Rooker, the grantor in said deed and first party herein, is the owner in her own and separate right and estate of the said above described lands situate in said Hamilton County, and the said Dora E. Rooker and William V. Rooker, her husband, grantors in said deed and parties of the first part, are the owners as tenants by the entireties of said real estate situate in said Marion County; and whereas the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, has heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences, and in so doing has been obliged to lay out and expend large sums of money, and has been obliged to incur obligations be-

yond her reasonable expectations and beyond her present means to pay; and whereas, the said improvements have been carried so far toward completion as that they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; and whereas, it requires six thousand ($6,000) dollars to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her, arising out of the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of the making of said improvements: Now, therefore, it is agreed that the said Fidelity Trust Company, second party herein, shall and it does hereby accept the title of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say:

"Clause A. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and directions of said Dora E. Rooker not exceeding the sum of six thousand ($6,000) dollars for and on account of the erection and construction of said dwelling house, outbuildings and improvements and their equipment and installation, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal of said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness shall be forever binding and conclusive on all parties concerned, that such debt or debts so ordered to be paid is and are in fact and in law the debts

of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

"Clause B. The said Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said trust company may deem necessary to protect its interest in and to said real estate, and to perform or better promote the performance of the trust herein and hereby created, and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her express written direction.

"Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker any such sum or sums of money, whether within or in excess of the sum of six thousand ($6,000) dollars as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

"Clause D. Said Fidelity Trust Company is hereby appointed, empowered, and authorized as the true and lawful attorney-in-fact of the first parties, and in their separate deed, joint name, place, right and stead to execute a deed of general warranty conveying said real estate or any part or parts thereof upon the limitations hereinafter stated and provided.

"Paragraph 3. Said Fidelity Trust Company shall have and receive for its compensation, trustee's fee of one hundred and fifty ($150) dollars and a commission of two per cent. on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with interest on all such moneys at the rate of six per cent.

per annum, to be credited semi-annually to said Fidelity Trust Company as a debt and charge against said Dora E. Rooker, and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company pursuant to this agreement, and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth (⅛) of one (1) per cent. on all notes for ninety (90) days or less for moneys obtained from any bank to the credit of said Dora E. Rooker on her paper originally made.

"Paragraph 4. It is further ever understood and agreed that at any time within one year after the date of these presents said second party may execute and perform so much of the power to sell and convey as is hereinbefore granted as pertains to said Marion County real estate, provided always that the sum received in consideration therefor shall be net to the credit of said Dora E. Rooker eighteen thousand ($18,000) dollars after the payment of the commission hereinbefore mentioned. Should it so happen that said Marion County real estate be not sold within said period of one year for said sum of eighteen thousand ($18,000) dollars plus commission, then after ninety (90) days' notice in writing to be given to first parties by second party, the said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring, and if said Marion County real estate does not sell for lack of a bid, then second party may upon ninety (90) days' notice in writing to be given to the first parties by the escond party sell and convey said Hamilton County real estate for whatever it will bring over and above the upset price of sixty-five thousand ($65,000) dollars. If said Hamilton County real estate does not sell for said sum of sixty-five thousand ($65,000) dollars for lack

of a bid of that sum, then the said second party hereto may publicly advertise and sell said Marion County real estate after ninety (90) days' notice given in writing to the first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale does not fetch enough to pay the moneys and perform the obligations herein charged upon and against said real estate, then said second party may proceed to sell and sell said Hamilton County real estate in the manner and form prescribed as to said Marion County real estate, after thirty (30) days' notice given in writing to first parties by second party.

"It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of real estate made pursuant to this agreement, as follows:

"(1) To the payment of any mortgage or other valid lien, charge, adverse interest or incumbrance upon and against said real estate or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

"(2) To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties as herein authorized and provided.

"(3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as hereinbefore authorized and provided.

"(4) The rest and residue of any money shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

"Paragraph 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the provisions of this contract shall convey to the grantee therein named an absolute

and unqualified estate as fully and completely as if such deed were made by the said first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

"Paragraph 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors and assigns."

Printed Tr., pp. 17-21; pp. 29-35.

THE TRUST DEEDS.

Contemporaneously with the execution of the above memorandum and as a part of the same transaction, appellants executed to the Fidelity Trust Company, as trustee, two indentures in the form of warranty deeds, in which the real estate referred to in the above memorandum was conveyed to said trustee on certain terms and conditions. The deed to the Hamilton County lands provided that the trust company should hold said real estate—

"in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

"Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and

any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Indiana.

"And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate, and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this grantor, the mortgagee and other lienholders in and to said real estate and to conserve the trust hereby created.

"And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, trustee, the said Fidelity Trust Company, trustee, shall be subrogated to all the rights of such original lienholders and the same shall be enforceable by it and collectible with interest at the rate of six per cent. per annum, to be credited semi-annually as a debt and charge against said real estate."

Printed Tr., pp. 29-35.

The deed to the Marion County lands provided that the trust company should hold said real estate—

"in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

"Said Fidelity Trust Company of Indianapolis, trustee as aforesaid, to sell and convey said real estate according to the terms of a certain contract of even date herewith within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety

days' notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis as such trustee, to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

"The said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrance or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created, and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid, and the same shall be collectible and enforceable in its hands,

together with interest thereon at the rate of six per cent. per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described."

Printed Tr., pp. 35-36.

Each conveyance was made subject to unpaid taxes and to certain described mortgages.

When the trust agreement was executed both parties entered upon performance.

THE NOTICE OF REPUDIATION.

On October 28, 1912, Mr. Smith and Mr. McNulty, officers of the Fidelity Trust Company, being duly empowered for the purpose, went to the residence of Dora E. Rooker and William V. Rooker and read to them and delivered to them a copy of a written instrument as follows:

"TO DORA E. ROOKER AND WILLIAM V. ROOKER, HER HUSBAND, NOBLESVILLE, INDIANA:

"DEMAND AND TENDER OF DEED.

"The undersigned, Fidelity Trust Company, trustee, and Fidelity Trust Company, hereby demand payment to them of the sum of eighteen thousand four hundred and fifty-three dollars and thirty-four cents ($18,453.34) due on account of advancements made under agreement of trust and secured by the Hamilton County farm, and demand payment of the sum of one thousand two hundred and forty dollars and seventy cents ($1,240.70) due on account of advancements made under agreement of trust and secured by the Marion County farm, making a total of nineteen thousand six hundred and ninety-four dollars and four cents ($19,694.04), and the said Fidelity Trust Company, trustee, herewith tenders for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County farms to the original grantors upon payment to them of the foregoing demand;

and further gives notice that upon failure to make payment of the aforesaid sum, upon demand now made, that said quit claim deeds will remain at the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the aforesaid demand.

FIDELITY TRUST COMPANY, *Trustee*,
By W. M. FOGARTY, *President*.
FIDELITY TRUST COMPANY,
By W. M. FOGARTY, *President*.

ATTEST:
JAS. G. FLAHERTY, *Secretary*.
FIDELITY TRUST COMPANY, [SEAL]
INDIANAPOLIS, IND."

Printed Tr., pp. 16-17.

THE CHRONOLOGY OF THE SUIT.

On October 30, 1912, Dora E. Rooker, her husband, William V. Rooker, joining, began suit in the Marion Circuit Court. The complaint was subsequently amended to bring in certain lienholders. These lienholders went out of the case on the former appeal to the Supreme Court and need not be considered further. The amended complaint recited the execution of the trust agreement and exhibited copies of the trust contract and the trust deeds. It averred that the parties had entered upon performance of the trust contract, but that afterwards the same had been violated by the trustee in particulars which were given; that finally the trustee had repudiated the trust and had renounced its duties thereunder, a copy of the instrument of repudiation being exhibited with the complaint.

The prayer of the complaint was as follows: "Wherefore these plaintiffs demand judgment, that an accounting be had of the extent of the interest of said Fidelity Trust Company in and to said property and that a reasonable time be fixed in which said indebtedness may be paid, and that in the meantime a receiver

be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement, and to perform with respect thereto such duties as the court may from time to time direct, and that damages sustained by said Dora E. Rooker, because of the non-performance of said contract, be ascertained and that she be given judgment accordingly; that the said co-defendants of said Fidelity Trust Company be required to set up their several respective interests in the premises, or on default that they be forever barred and shut out and that the clerk of this court, upon the rendition of such judgment, be ordered and directed to enter of record the release and satisfaction of each and every such lien and incumbrance, and plaintiffs pray for all proper relief."

Printed Tr., pp. 9-21.

On March 24, 1913, the defendant Fidelity Trust Company filed its counter claim, called a cross-complaint, in said cause against the plaintiffs, Dora E. Rooker and William V. Rooker, and caused summons to be issued thereon, for, and served upon, said cross-defendants. In this cross-complaint the Fidelity Trust Company reaffirmed its act of repudiation by declaring upon the trust agreement of October 11, 1909, as being a mortgage. The cross-complaint averred that the Fidelity Trust Company had made certain advancements to Dora E. Rooker on the security of the trust agreement, it demanded judgment for the amount of its claim and for the foreclosure of the trust deed as a mortgage, and for a decree of sale of the trust estate to pay the judgment to be rendered in the cause.

Printed Tr., p. 9; pp. 21-46.

On October 27, 1913, such proceedings in the meantime having been had as that the cause was at issue on the amended complaint of the plaintiffs, Dora E. Rooker and William V. Rooker, and on the amended cross-complaint of the Fidelity Trust Company, the

cause was submitted to the court for trial without the intervention of a jury.

Printed Tr., pp. 60-61.

On December 13, 1913, the trial court rendered judgment to the effect that the trust agreement was in fact and in law a mortgage, foreclosed the same and directed the sale of the trust estate by the sheriff to pay the judgment debt of $23,201.44. The appeal bond was fixed at $30,000, and thirty days' time was given. There was no supersedeas.

On May 15, 1914, the Fidelity Trust Company, having purchased the American Central Life mortgage on the Hamilton County farm, sued Dora E. Rooker and William V. Rooker to foreclose said mortgage.

Printed Tr., pp. 433-440.

On June 8, 1915, the sheriff of Marion County, in consideration of $4,000 paid by credit on the judgment, executed his deed in statutory form, conveying the lands of the trust estate in Marion County to the Fidelity Trust Company, purchaser thereof at sheriff's sale, in disregard of the valuation of said lands at $18,000.

Printed Tr., pp. 281-8.

On September 28, 1915, the sheriff of Hamilton County, in consideration of $20,864.14, paid by credit of balance in full on the judgment, executed his deed in statutory form, conveying the lands of the trust estate in Hamilton County to the Fidelity Trust Company, purchaser thereof, at sheriff's sale, in disregard of the valuation of said lands at $65,000.

Printed Tr., pp. 278-80.

On October 5, 1915, the Supreme Court of Indiana reversed the judgment of the Hamilton Circuit Court, rendered on December 13, 1913, the Supreme Court holding that the instruments in issue were a trust agreement and not a mortgage.

The mandate of the Supreme Court of Indiana on

that appeal was: "The judgment of the trial court in the case at bar is contrary to law and must be set aside. Judgment revised with instructions to sustain appellant's separate and several motions for a new trial, and for further proceedings in accordance with this opinion."

Rooker v. Fidelity Trust Co., 185 Ind. 172; Id. 109 N. E. 766.

On March 15, 1913, there was approved an act of the General Assembly of Indiana, entitled "An act concerning proceedings in civil and criminal cases."

Indiana Acts 1913, p. 850; 1 Burns R. S. 1914, sec. 343a.

On March 5, 1915, there was approved an act of the General Assembly of Indiana, entitled "An act to amend an act, entitled 'An act concerning proceedings in civil and criminal cases,' approved March 15, 1913."

This amended act in so far as it is germane here is as follows:

> "Sec. 1. That hereafter in all pleadings, papers, or writings which are filed in or before any court in any civil * * * case, or in any proceedings of any kind where the sufficiency of the same can, may be or is called in question, that all recitals therein, and all statements contained in any participial expression or following the words 'having' or 'being' shall be considered and held to be allegations of fact whenever necessary to the sufficiency thereof, and *all conclusions stated therein shall be considered and held to be the allegation of all the facts required to sustain said conclusion when the same is necessary to the sufficiency of such pleading, paper or writing.* PROVIDED, *That as against such conclusions* only the following remedy is given, that a motion may be made to require the party filing such pleading, paper or writing to state the facts necessary to sustain the

conclusion alleged, said motion setting out wherein such pleading, paper or writing is insufficient. If no such motion is made and ruled upon, all objections on account thereof are waived."

Indiana Acts 1915, p. 123; 5 Burns R. S. 1921, sec. 343a.

On May 26, 1915, suit was begun in the Marion Circuit Court by these petitioners against George V. Coffin as Sheriff and the Fidelity Trust Company, to quiet plaintiffs' title to the Marion county lands of the trust estate as against the cloud thereon placed by defendants in making the sale of said land under the decree of the Hamilton Circuit Court, in the foreclosure of the trust deed as a mortgage.

Printed Tr., pp. 166-7; pp. 470-1.

On June 23, 1917, a new party was introduced to the record in the pending suit in the Marion Circuit Court, viz: The Fidelity Trust Company as trustee of the estate of Dora E. Rooker. Louis B. Ewbank was sole judge of the Marion Circuit Court at the time the Fidelity Trust Company as trustee intervened in the Court in said suit and he continued as such during all the time said cause was pending in said Court. Subsequently said Ewbank became and he now is a member of the Supreme Court of Indiana.

Printed Tr., pp. 167.

On March 8, 1916, one Volney T. Malott, of said Marion county, a man of advanced years and who was possessed of vast wealth, executed his last will and testament, wherein he nominated the said Louis B. Ewbank as co-executor of said will and co-trustee of the estate of said decedent said trusteeship to continue until March 2, 1944.

Printed Tr., pp. 472-4.

On June 14, 1921, said Volney T. Malott departed this life at said Marion county.

Printed Tr., pp. 472-4.

On June 20, 1921, said Will of said Volney T. Malott was admitted to probate in the Probate Court of said Marion county, and when this was done the provisions of said will were set forth in the daily newspapers, including the provision that said Ewbank was said co-executor and co-trustee. This was the first information Dora E. Rooker and William V. Rooker or either of them had that said Ewbank was said executor and trustee.

Printed Tr., pp. 472-4.

On February 5, 1918, said Ewbank as said Circuit judge heard and determined said cause of these plaintiffs in said Marion Circuit Court and rendered judgment against them and said judgment is the same judgment mentioned in the record in this case. It is shown by petitioners that said Ewbank knew all the time affected by the proceedings in the premises that he was such executor and trustee and that he thereby had a personal and disqualifying interest in establishing precedents in respect of trustees and trusts.

Printed Tr., pp. 166-7.

On January 29, 1916, the Clerk of the Supreme Court of Indiana filed in the office of the Clerk of Hamilton Circuit Court the opinion and mandate of the Supreme Court reversing the judgment of the Hamilton Circuit Court which had determined that said trust deed was a mortgage and decreeing its foreclosure.

Printed Tr., p. 65.

On June 27, 1917, there was filed in said cause in the Hamilton Circuit Court a paper denominated "the second amended counter claim of the Fidelity Trust Company in its corporate capacity proper and as trustee, etc." This second amended counter claim occupies one hundred and nine pages of the certified record. (Clerks Tr., pp. 121-220.)

Printed Tr., pp. 66-141.

On July 11, 1917, plaintiffs filed their motions to

strike out the second amended counter claim of the Fidelity Trust Company in its corporate capacity proper. Overruled and exception.

Printed Tr., pp. 141-3.

On July 11, 1917, plaintiffs filed their demurrers to the second amended counter claim of the Fidelity Trust Company in its corporate capacity proper. Overruled and exceptions.

Printed Tr., pp. 143-5.

On August 4, 1917, plaintiffs filed their motions to require the Fidelity Trust Company to make its second amended counter claim more certain and specific. Overruled and exceptions.

Printed Tr., pp. 145-7.

On October 23, 1917, plaintiffs filed their supplemental complaint.

Printed Tr., pp. 147-55.

On October 23, 1917, plaintiffs filed their motions to strike out the second amended counter claim of the Fidelity Trust Company as trustee. Overruled and exceptions.

Printed Tr., pp. 155-158.

On October 23, 1917, plaintiffs filed their motions to strike out the joint second amended counter claim of the Fidelity Trust Company in its corporate capacity proper and of the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. Overruled and exceptions.

Printed Tr., pp. 155-8.

On October 23, 1917, plaintiffs filed their demurrers to the second amended counter claim of the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. Overruled and exceptions.

Printed Tr., pp. 159-64.

October 23, 1917, plaintiffs filed their demurrer to the joint second amended counter claim of the Fidelity Trust Company in its corporate capacity proper and

of the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. Overruled and exceptions.

Printed Tr., pp. 159-64.

On May 29, 1918, defendants filed answer in general denial to the supplemental complaint.

Printed Tr., p. 165.

On May 29, 1918, defendants filed second supplemental amended counter claim.

Printed Tr., pp. 165-73.

On May 29, 1918, plaintiffs filed partial replies to the counter claim of Fidelity Trust Company in its corporate capacity proper.

Printed Tr., pp. 173-195.

On May 29, 1918, plaintiffs filed partial replies to the counter claim of Fidelity Trust Company as trustee of the estate of Dora E. Rooker.

Printed Tr., pp. 173-195.

On May 29, 1918, the Fidelity Trust Company in its corporate capacity proper filed answer in general denial to each paragraph of partial reply of the plaintiffs.

Printed Tr., p. 195.

On May 29, 1918, the Fidelity Trust Company as trustee of the estate of Dora E. Rooker filed answer in general denial to each paragraph of partial reply of the plaintiffs.

Printed Tr., p. 195.

On June 5, 1918, plaintiffs filed their demurrers to the second amended counter claim as supplemented, of the defendants Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as trustee of the estate of Dora E. Rooker. Overruled and exceptions.

Printed Tr., pp. 195-6.

On June 5, 1918, plaintiffs filed their answers in general denial to the joint counter claim of Fidelity Trust Company in its corporate capacity proper and of Fi-

delity Trust Company as trustee of the estate of Dora E. Rooker.

Printed Tr., pp. 196-7.

On June 5, 1918, defendants filed reply to plaintiffs' answers to the counter claim of defendants.

Printed Tr., p. 197.

On July 30, 1918, defendants filed answers of general denial to the supplemental complaint also replies to the partial answers to the counter claim.

Printed Tr., p. 197.

On July 30, 1918, the cause was submitted to the Court for trial without the intervention of a jury.

Printed Tr., p. 197.

On December 31, 1918, the Court filed its special findings of facts.

Printed Tr., p. 197.

On December 31, 1918, the plaintiffs filed their motions for judgment on the special findings. Overruled and exceptions.

Printed Tr., p. 213.

On December 31, 1918, the Court stated its conclusions of law on the special findings of facts and the plaintiffs excepted to each conclusion of law. Exceptions overruled.

Printed Tr., pp. 213-4.

On December 31, 1918, the Court rendered judgment on its special findings of facts and conclusions of law.

Printed Tr., p. 215.

On January 2, 1919, plaintiffs filed their motions to modify the judgment. Overruled and exceptions.

Printed Tr., pp. 217-21.

On January 15, 1919, plaintiffs filed their motions for new trial.

Printed Tr., pp. 221-4.

On February 5, 1919, the Court overruled plaintiffs' motions for a new trial; exceptions; plaintiffs prayed appeal to the Supreme Court. Appeal bond fixed at

$65,000.00 to be filed in thirty days. There was no supersedeas.

Printed Tr., pp. 224-5.

On March 28, 1919, plaintiffs tendered to the Court their bill of exceptions containing the evidence given and offered at the trial.

Printed Tr., p. 225.

On April 28, 1919, the Court allowed plaintiffs' bill of exceptions, the same was filed and ordered made a part of the record in the case.

Printed Tr., pp. 225-452.

On April 28, 1919, plaintiffs filed their praecipe for a transcript of the record, in the office of the Clerk of the Hamilton Circuit Court.

Printed Tr., pp. 452-3.

On June 18, 1919, plaintiffs filed in the office of the Clerk of the Supreme Court their transcript of the record, with assignments of error and praecipe for notice of appeal, etc.

Printed Tr., pp. 453-4.

On July 19, 1919, the cause was submitted in the Supreme Court.

Printed Tr., p. 454.

On October 14, 1920, the cause was argued orally in the Supreme Court.

Printed Tr., p. 455.

On June 22, 1921, the Supreme Court affirmed the judgment below.

Printed Tr., pp. 455-469.

On August 11, 1921, plaintiffs filed their verified petition for rehearing. It brought in new matter.

Printed Tr., pp. 469-493.

On October 12, 1921, the petition for rehearing was overruled.

Printed Tr., p. 493.

THE ISSUES SUBMITTED AT FIRST TRIAL.

The issues submitted to the Court for trial on the first trial are stated in the following summary of the pleadings.

THE COMPLAINT.

The original complaint had been amended to bring in certain lienholders. The interests of these lienholders were finally disposed of on the first appeal of this cause to the Supreme Court of Indiana, and they are not now considered in this statement. The amended complaint averred that on October 11, 1909, Dora E. Rooker and her husband, William V. Rooker, executed their certain warranty deed to the Fidelity Trust Company conveying to said trust company certain described real estate in Marion county containing eighty acres more or less, and in Hamilton county, containing two hundred and seventy-five acres more or less, all in the State of Indiana. That said warranty deed was executed concurrently with a certain instrument of trust defining and limiting the interest and estate of said Fidelity Trust Company in and to said real estate, a copy of which trust agreement marked "Exhibit A," was filed therewith; that said real estate so conveyed was at the time of the reasonable value of one hundred thousand dollars; that in and by said trust agreement said Fidelity Trust Company undertook and agreed to pay off certain indebtedness of said Dora E. Rooker arising out of and incident to the making of certain improvements on said real estate; that said improvements had at the time been carried so far toward completion as that they could not then be abandoned nor the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; that it then required at least six thousand dollars to complete said improvements and to pay off said indebtedness of said Dora E. Rooker,

incurred by her out of the making of said improvements and in the completion and installation thereof; that in consideration of the premises and in consideration of the conveyance of said land to Fidelity Trust Company and in consideration of the promise of said Dora E. Rooker to pay certain rates, fees and charges named and specified in said trust agreement, the Fidelity Trust Company promised and agreed thereafter to pay from time to time upon the written order and direction of Dora E. Rooker six thousand dollars for and on account of the erection and construction of said dwelling house, outbuildings and improvements and the equipment and installation thereof and such other sum or sums of money than those above specified as might be necessary to perform or better promote the performance of said trust and to the end that such additional funds might be obtained said Fidelity Trust Company convenanted and agreed to obtain from other bank or banks upon the promissory notes of said Dora E. Rooker all such sums or sum of money, whether within or in excess of the sum of six thousand dollars as might be necessary to the true and better and complete performance of said contract and to the successful maintenance of and care for said real estate and the business thereon conducted, and to that end it became necessary for said Fidelity Trust Company to protect and preserve the credit of said Dora E. Rooker at the banks at which she did business and to do every other act as might be necessary and proper to the complete performance of said contract; that said Fidelity Trust Company further undertook to sell said real estate and close said trust within two years after the date of the execution of said instrument and in the particular manner stipulated and described in paragraph four of said trust deed, to which reference was made for greater certainty; that said Fidelity Trust Company in wrongful disregard of its duties in the premises and in violation of the rights of said Dora E. Rooker, had failed

and refused to pay off said indebtedness and had failed and refused to protect and preserve the credit of said Dora E. Rooker at banks and had failed and refused to continue or permit continuance of the work of said improvement and the completion and installation thereof, but on the contrary said Fidelity Trust Company by failing and refusing to pay said indebtedness and falsely and wrongfully misrepresenting the credit and condition of the said trust estate, wholly destroyed the credit of said Dora E. Rooker at banks and elsewhere and said trust company stopped work on said improvements and forced and required contractors to abandon work thereon in such manner as that said Dora E. Rooker was wholly without recourse against said contractors and said Fidelity Trust Company caused and required said contractors to turn over and assign to it their said contracts and it wrongfully caused and required them to incumber said real estate and cloud the title thereof with notices of liens and otherwise and it also wrongfully caused them to sue on claims all to the end that said trust estate might be so wasted and wrecked as that said trust estate could the better be appropriated by the said Fidelity Trust Company and to that end it caused its co-defendants herein to be and become parties to its said breaches of said contract, etc.; that said Fidelity Trust Company had failed and refused to pay the taxes and interest charged against said real estate but had allowed the same to become delinquent and in default and had refused to sell said real estate or any part thereof though it had the opportunity so to do, having in one instance had an opportunity to dispose of said real estate in Marion county at a fair cash valuation of twenty-three thousand dollars; that it had failed and refused to make provision for the maintenance of the business carried on on said real estate by reason whereof crops thereon were wholly lost and said

Marion county farm remained idle and wholly unproductive for two years at an annual loss of fifteen hundred dollars; that by reason of the premises the said Dora E. Rooker had been damaged fifteen thousand dollars; that prior to the bringing of this suit said trust company wholly repudiated its said trust and served written notice thereof on plaintiff that a copy of said notice, marked "Exhibit No. 1" is filed herewith.

"Wherefor these plaintiffs demand judgment, than an accounting to be had of the extent of the interest of said Fidelity Trust Company in and to said property and that a reasonable time be fixed in which said indebtedness may be paid and that in the meantime a receiver be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement and to perform with respect thereto such duties as the Court may from time to time direct and that damages sustained by said Dora E. Rooker because of the non-performance of said contract be ascertained, and that she be given judgment accordingly; that said co-defendants of said Fidelity Trust Company be required to set up their several respective interests in the premises or on default that they be forever barred and shut out and that the Clerk of this Court upon the rendition of such judgment be ordered and directed to enter of record the release and satisfaction of each and every such lien and incumbrance and plaintiffs pray for all proper relief."

Printed Tr., pp. 13-21.

THE NOTICE OF REPUDIATION.

The notice of repudiation of the trust served on Dora E. Rooker and her husband William V. Rooker, prior to the bringing of this suit, and exhibited with the complaint is the same stated *supra* in the chronological recital of events in the case. It follows:

"To Dora E. Rooker and William V. Rooker her husband, Noblesville, Indiana.

"DEMAND AND TENDER OF DEED.

"The undersigned Fidelity Trust Company trustee and Fidelity Trust Company, hereby demand payment to them of the sum of eighteen thousand four hundred and fifty-three dollars and thirty-four cents ($18,453.34) due on account of advancements and made under agreement of trust and secured by the Hamilton county farm, and demand payment of the sum of one thousand two hundred and forty dollars and seventy cents ($1,240.70) due on account of advancements made under agreement of trust and secured by the Marion county farm, making a total of nineteen thousand six hundred and ninety-four dollars and four cents ($19,694.04) and the said Fidelity Trust Company herewith tenders for delivery its said quit claim deeds conveying and quit claiming said Hamilton county and Marion county farms to the original grantors upon the payment to them of the foregoing demand and further give notice that upon failure to make payment of the aforesaid sum upon demand now made, that said quit claim deeds will remain at the office of Fidelity Trust Company for delivery until October 30th, 1912, upon payment of the aforesaid demand.

FIDELITY TRUST COMPANY, *Trustee.*
By W. M. FOGARTY, *President.*
FIDELITY TRUST COMPANY,
By W. M. FOGARTY, *President.*

ATTEST:
(SEAL)
JAMES G. FLAHERTY, *Secretary.*
Printed Tr., pp. 13-21.

The trust agreement exhibited with the complaint appears *supra* and it appears, also, *post* in the opinion of the Supreme Court of Indiana on the first appeal of this case.

THE COUNTER CLAIMS.

There are two separate and distinct counter claims in record in this case.

The one of these first in point of time was filed solely by the Fidelity Trust Company in its corporate capacity proper. It was filed prior to the first appeal of this cause to the Supreme Court of Indiana. It declared upon the trust agreement as a mortgage and sought foreclosure.

Printed Tr., pp. 22-46.

The one of these second in point of time was filed jointly by the Fidelity Trust Company in its corporate capacity proper and by the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. It was filed subsequent to the first decision of this cause by the Supreme Court of Indiana.

Printed Tr., pp. 66-141.

The record discloses that the first of these counter claims, being the one filed by the Fidelity Trust Company in its corporate capacity proper, never was dismissed in fact and, plaintiffs contend that it was not dismissed by mere operation of law on the filing of the joint counter claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. Each of these as to the other was *res inter alios acta* and they are not therefore substitutional and could not be substituted, the dual one for the single one.

THE FIRST COUNTER CLAIM.

The first counter claim, as amended, was filed by the Fidelity Trust Company, which described its position as "a corporation organized under and pursuant to the laws of Indiana." Its averments included that on the 11th day of October, 1909, Dora E. Rooker was "the owner in her own separate right and estate of certain described lands situate in Hamilton county, Indiana,

and said Dora E. Rooker and William V. Rooker, her husband, were the owners as tenants by the entireties of certain lands described, situate in Marion county, Indiana; that in the course of the erection of a dwelling house on her Hamilton county land said Dora E. Rooker had become involved beyond her present means to pay and being then desirous of borrowing certain sums of money for the purpose of paying off existing debts and of completing the improvements which were then in process of construction and for the purpose of carrying on the business of said Dora E. Rooker which consisted in operating the farm lands hereinafter described, entered into a written contract wherein it was mutually agreed that the said cross-plaintiff Fidelity Trust Company should pay, and it did agree to pay the sums necessary to carry out the said purposes of Dora E. Rooker and such further sums as said trust company might deem necessary to protect its interest in the premises; that it was further agreed that said trust company should have and receive for its compensation a fee of $150.00 and a commission of two per cent. on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest and to promote a true and better performance of its trust, together with interest on all such moneys at the rate of six per cent. per annum to be credited semi-annually to said cross-complainant Fidelity Trust Company as a debit and charge against the said plaintiff Dora E. Rooker, a copy of which contract was exhibited with the Complaint; that to secure the repayment of said moneys to cross-complainant Dora E. Rooker and her husband William V. Rooker, executed their certain mortgage in form a warranty deed conveying said described lands which deeds were exhibited with the cross-complaint; "Said cross-complainant avers that while said deeds aforesaid were executed to the Fidelity Trust Company, trustee, that the same were in-

tended to secure the money advanced by said Fidelity Trust Company and that all amounts advanced as herein set forth were advanced by the Fidelity Trust Company under the contract and agreement hereinbefore set out"; that certain described payments of money were made by cross-complainant under said contract; that plaintiffs are committing waste on said premises.

"Wherefor cross-plaintiff sues and demands judgment that the said deeds aforesaid be declared a mortgage, that an accounting be had and that the cross-plaintiff be given judgment against the plaintiff Dora E. Rooker, for the amounts found due and owing the cross-plaintiff herein together with interest thereon from the dates of the payment thereof that the amounts so found due and owing cross-plaintiff be adjudged a lien against the real estate herein described and that cross-plaintiff have foreclosure of said mortgage against said Dora E. Rooker and William V. Rooker and that said real estate or so much thereof as may be necessary for that purpose be sold in satisfaction of the amount found due by the Court; that a receiver be appointed to take charge of the real estate herein described during the equity of redemption and for all proper relief."

Printed Tr., pp. 22-46.

Issues were joined with a general denial and with certain special answers to which were filed replies in general denial and likewise issue was joined on the complaint.

Printed Tr., p. 60.

The judgment rendered on those issues was reversed by the Supreme Court on the first appeal and the cause was remanded for new trial without statement as to leave to amend.

Rooker v. Fidelity Trust Co., 185 Ind. 172.

FIRST OPINION OF THE SUPREME COURT.

For convenience we herewith reproduce the first opinion and mandate of the Supreme Court of Indiana as follows, to-wit:

"Spencer, C. J. On October 11, 1909, appellants, Dora E. Rooker and William V. Rooker, as first parties and the appellee, Fidelity Trust Company, as second party, entered into a certain trust contract and executed as evidence of such contract the following memorandum in writing, omitting the formal parts:

"Witnesseth:

"Paragraph 1. That concurrently herewith and as part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed, conveyed to the second party as trustee, ever upon the conditions and trust and for the uses and purposes herein more particularly set forth, the following real estate in Marion county, in the state of Indiana, to-wit: (Here follows description of same.)

"Also the following real estate in Hamilton County, in the state of Indiana, to-wit: (Here follows description of same.)

"That reference is hereby made to the said warranty deed and to the several descriptions therein for greater certainty.

"Paragraph 2. That said warranty deed is made ever upon the conditions and trust and upon the powers and for the uses and purposes more particularly set forth, that is to say:

"Whereas the said Dora E. Rooker, the grantor in said deed and first party herein is the owner in her own and separate right and estate of the said above described land situated in said Hamilton county and the said Dora E. Rooker and William V. Rooker, her husband, grantors in said deed, and parties of the first part

are the owners as tenants by the entireties of said real estate situated in said Marion county, and

"Whereas the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton county, Indiana, has heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences and in so doing has been obliged to lay out and expend large sums of money and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay, and

"Whereas, the said improvements have been carried so far toward completion as that they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate, and

"Whereas, it requires six thousand ($6,000) dollars to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her arising out of the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of the making of said improvements.

"Now, therefore, it is agreed that the said Fidelity Trust Company, second party herein, shall and it does accept the tile of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say:

"Clause A. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and direction of said Dora E. Rooker not exceeding the sum of six thousand ($6,000.00) dollars for and on account of the erection and construction of said dwelling house, out buildings and improvements and the equipment and installation

thereof, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal of said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness, shall be forever binding and conclusive on all parties concerned that such debt or debts so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

"Clause B. The said Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said Trust Company may deem necessary to protect its interest in and to said real estate and to perform or better promote the performance of the trust herein and hereby created and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her express written direction.

"Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker any such sum or sums of money, whether within or in excess of the sum of six thousand ($6,000.00) dollars as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

"Clause D. Said Fidelity Trust Company is hereby appointed, empowered and authorized as the true and lawful attorney in fact of the first parties and in their

separate deed, joint name, place, right and stead to execute a deed of general warranty conveying said real estate or any part or parts thereof upon the limitations herein stated and provided.

"Paragraph 3. Said Fidelity Trust Company shall have and receive for its compensation, trustees' fee of one hundred and fifty ($150.00) dollars and a commission of two per cent. on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with interest on all such moneys at the rate of six per cent. per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against said Dora E. Rooker and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company, pursuant to this agreement and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth (⅛) of one (1) per cent. of all moneys obtained from any bank to the credit of said Dora E. Rooker on her paper originally made.

"Paragraph 4. It is further ever understood and agreed that at any time within one year after the date of these presents said second party may execute and perform so much of the power to sell and convey, as is hereinbefore granted, as pertains to said Marion county real estate provided always that the sum received in consideration therefor shall be net to the credit of said Dora E. Rooker eighteen thousand ($18,000.00) dollars after the payment of the commission hereinbefore mentioned. Should it so happen that said Marion county real estate be not sold within said period of one year for said sum of eighteen thousand ($18,000.00) dollars plus commission, then after ninety days notice in writing to be given to first parties by second party,

the said second party may publicly advertise said Marion county real estate and sell the same at whatever sum it may bring and if said Marion county real estate does not sell for lack of a bid, then second party may upon ninety days' notice in writing to be given to the first parties by the second party, sell and convey said Hamilton county real estate for whatever it will bring over and above the set price or sixty-five thousand ($65,000.00) dollars. If said Hamilton county real estate does not sell for said sum of sixty-five thousand ($65,000.00) dollars for lack of a bid of that sum, then the said second party hereto may publicly advertise and sell said Marion county real estate after ninety (90) days notice given in writing to first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion county real estate upon such sale do not fetch enough to pay the moneys and perform the obligation herein charged upon and against said real estate, then said second party may proceed to sell, and sell, said Hamilton county real estate in the manner and form prescribed as to said Marion county real estate, after thirty (30) days notice given in writing to first parties by second party.

"It is even understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of said real estate made pursuant to this agreement, as follows:

"(1) To the payment of any mortgage or other valid lien, charge, adverse interest or incumbrance upon and against said real estate, or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

"(2) To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties as herein authorized and provided.

"(3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as hereinbefore authorized and provided.

"(4) The rest and residue of any money shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

"Paragraph 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if such deed were made by the said first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

"Paragraph 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors and assigns."

"Contemporaneously with the execution of the above memorandum and as part of the same transaction, appellants executed to the Fidelity Trust Company, as trustee, two indentures in the form of warranty deeds, in which the real estate referred to in the above memorandum was conveyed to said trustee on terms and conditions. The deed to the Hamilton county lands provided that the Trust Company should hold said real estate

"in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

"Said Fidelity Trust Company of Indianapolis, In-

diana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be, from time to time, dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Indiana.

"And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance, or convey the same subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

"And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, trustee, the said Fidelity Trust Company, trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforceable by it and collectible with interest at the rate of six per cent. per annum, to be credited semi-annually as a debt and charge against said real estate."

The deed to the Marion county lands provided that the trust company should hold said real estate "in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and dis-

charge the obligations of the trust herein with the powers and limitations as follows:

"Said Fidelity Trust Company of Indianapolis, trustee, as aforesaid, to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within the said period of one (1) year, for the sum nominated in said contract, then after ninety days notice in writing to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis as such trustee to execute the proper trustees deed conveying the title thereto in fee simple to its said purchasers, it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in nowise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

"The said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrance or subject to any existing incumbrances, and to do any

and all acts and to execute any and all papers which may be necessary to protect the interests of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of six per cent. per annum to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described."

"Each conveyance was made subject to unpaid taxes and to certain described mortgages.

"On October 30, 1912, appellants brought an action in the Marion Circuit Court against appellee, in which they charged a violation of the trust agreement, and asked for an accounting and for the appointment of a receiver to carry out the trust embodied in said contract. Later the cause was venued to the Hamilton Circuit Court where appellants filed an amended complaint in which the firm of Lilly and Stalnaker, the Illinois Surety Company, the Balke & Krauss Company, and one Daniel I. Neher were joined as party defendants to answer as to their respective interests in the premises, if any. Of these defendants, Lilly and Stalnaker and the Illinois Surety Company filed disclaimers, and Neher was subsequently defaulted, while the interest of the Balke & Krauss Company, represented by a judgment against the Hamilton county real estate, was found on final hearing to have been assigned to appellee and said judgment was merged in the judgments in this cause.

"Appellee entered a general denial to the amended

complaint and also filed an amended counter claim, denominated a cross-complaint, in which it alleged the payment of large sums of money by it in accordance with the terms of the trust agreement and for the protection of its rights thereunder. It further charged waste on the part of appellants and asked that an accounting be had; that the deeds above described be declared a mortgage and foreclosed; and that a receiver be appointed to take charge of the property during the year of redemption. We deem it unnecessary to make extended reference to the several motions addressed by appellants to this pleading, nor to the ten paragraphs of special and partial answer filed thereto. It is sufficient to say in general: (1) That they present appellants' theory that the instruments above set out constitute a trust agreement which, it is charged, has been violated and abused in the particulars set forth; and (2) that they oppose the position taken by appellee that the conveyance, while in form of trust deeds, in fact constitute a mortgage which was executed as security for the prepayment of advancements made by it. The issues were closed with an answer of general denial to the counter-claim and with a reply in denial to the several paragraphs of special and partial answer filed by appellants. The cause was tried by the court which, at request of appellants, made a special finding of facts and also a general finding, in which it found against appellants on the issues presented by their amended complaint and in favor of appellee on the issues joined on its amended counter-claim.

"The court thereupon rendered judgment, foreclosing the mortgage and directing a sale of the property in question, and at the same time rendered personal judgments which determined the matter of costs as between the Illinois Surety Company, Lilly and Stalnaker, Daniel I. Neher, and appellants. None of the parties

last above mentioned, other than appellants, are now before this court and as this is a vacation appeal, appellee insists that it should be dismissed without an inquiry into the merits for the reason that all the parties to the judgment below are not named in the assignment of errors in this court. This appeal, however, is from the judgment *in rem* rendered on the issues which involve the construction of the instruments herein set out and and does not question the personal judgments which determined only certain matters of costs. No parties, other than appellants and appellee, are affected by the judgment from which this appeal is prosecuted, and they are the only necessary parties to the proceeding.

Zimmerman v. Gaumer (1898), 152 Ind. 552, 554, 53 N. E. 829;

Lowe v. Turpie (1896), 147 Ind. 652, 692; 41 N. E. 25; 47 N. E. 150; 37 L. R. A. 233.

"The principal question to be determined here is the proper construction to be given to the instruments which are made the basis of this action. In support of its contention that the deeds in question in fact constitute a mortgage, appellee relies on the following propositions of law:

"(1) That different instruments, executed at the same time, relating to the same matter constitute one transaction and must be read and construed together.

Knepper v. Eggiman (1911), 177 Ind. 56, 62; 97 N. E. 161;

Schmueckle v. Waters (1890), 125 Ind. 265, 267; 25 N. E. 281.

"(2) That any conveyance of real estate, whatever its form, which is in fact executed for the purpose of securing a debt, is a mortgage.

Sinclair v. Gunzenhauser (1912), 179 Ind. 78, 121; 98 N. E. 37; 100 N. E. 376;

Brown v. Follette (1900), 155 Ind. 317, 321; 58 N. E. 197;

Lowe v. Turpie, supra.

"(3) That the power of sale contained in the instruments here involved does not exclude the right of foreclosure by judicial proceeding.

Sinclair v. Gunzenhauser, supra;

Eaton, Etc., R. Co. v. Hunt (1863), 20 Ind. 457, 464; Sec. 4029 Burns R. S. 1914; Sec. 2986 R. S. 1881.

"There can be no doubt that the general rule which precludes the admission of parol or extrinsic evidence to vary or contradict the terms of a written instrument is subject to the exception that a deed absolute on its face may, in equity, be shown by parol evidence to have been intended to have the effect of a mortgage merely. This exception has found frequent expression in the decisions of this and the appellate court, and its existence as an established rule is conceded by appellants. It is their contention, however, that it has no application where, as in this case, the deed or other instrument of conveyance is but one element in a transaction which has been reduced to writing in its entirety and is evidenced by a memorandum embodying all of its terms. This position is well taken. As recently stated by this court, where there is a formal written contract which appears to be complete within itself, it will be presumed to be the repository of the final intentions of the parties in regard to the subject matter of this agreement. Oral declarations relative thereto will be disregarded and the rights of the parties determined as they appear from the written instrument.

Strebel v. Bligh, 183 Ind. 537; 109 N. E. 45.

"The instruments now before us embody but one contract, the terms of which are stated in the memorandum above set out, and the legal force and effect of the trust deeds, as they are termed, depend upon the

intention of the parties as it is evidenced by said memorandum. From the terms of this instrument, there can be no doubt that it was one purpose of appellants to provide therein for the repayment to appellee of such sum or sums as it should advance to them or expend in their behalf. To that extent the instruments may be construed as affording security to appellee for money advanced, but not every instrument which affords security is a mortgage, nor is it the primary or sole purpose of the contract in this case to insure the payment of appellees' claim and no others. Appellees were the owners of a considerable amount of real estate, on a part of which certain improvements were contemplated and were in fact under course of construction. The expense of these improvements proved greater than was anticipated and the claims of creditors were being pressed. It became evident that to prevent great sacrifice or loss to the estate, provision had to be made for the completion of the work in hand, for the proper maintenance of the property until disposed of and for the payment of debts owing by appellants. To that end the agreement evidenced by the instruments here in suit was entered into and all parties thereto obligated themselves, their representatives and assigns, to the proper performance of its terms. The evident purpose of its execution and the language used by the parties makes it clear that at the time it was entered into the agreement was treated as a trust and not as a mortgage.

"Reference may here be made to the cases of Taylor v. Cornelius (1869), 60 Pa. St. 187, and Woodruff v. Robb (1850), 19 Ohio 212, to which our attention is called by appellee as decisive of the questions here presented. Without reviewing these decisions at length, it may be noted that in each case the instruments in suit contained a condition of defeasance which provided, in substance, that on payment of certain debts,

the property or so much as remained thereof, should be reconveyed to the grantor in the trust deed. In the case at bar, no provision is made for the reconveyance to appellants of the real estate involved or any part thereof. The fair construction of the instruments before us is that an effort on the part of appellants to provide for the conversion of their property into money in order that their just debts might be paid. AS SUCH IT IS A CONTRACT GOVERNED BY THE LAW OF TRUSTS. True, provision is made for the advancement of certain sums of money by appellee to appellants or on their order, but it is apparent that the advancements so made do not supply the entire consideration for the execution of the contracts and they are to be included among debts to be paid out of the funds realized from the sale of the lands in question. If, by reason of the improvements contemplated or other circumstances, the proceeds realized from the sale of said lands be more than sufficient to pay all obligations, then the residue of such proceeds is to go to appellant Dora E. Rooker, her heirs and assigns. To that extent they may be said to possess an equitable interest in the estate and their position with reference thereto is somewhat analogous to that of other creditors, but nowhere in the instruments of conveyance is there a contingency expressed or implied, on the happening of which appellants, or either of them, would be entitled to a reconveyance of any part of said lands.

"The distinction between an absolute deed of trust and a deed of trust in the nature of a mortgage is clearly stated in Hoffman, Burneston & Co. v. Mackall (1885), 5 Ohio St. 124, 64 Am. Dec. 637, and the decision in that case supports our construction of the instruments here in controversy. We quote from the opinion (p. 130) as follows: "There is a manifest and well settled distinction between an unconditional deed of trust, and a mortgage or deed of trust in the

nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject matter thereof, for the purpose expressed; whereas the latter is conditional and defeasible. A mortgage is the conveyance of an estate, or pledge of property, as security for the payment of money, or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of a mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to sell the land in case of a default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. The court concludes in language applicable here, that it 'is manifest from this distinction that the conveyance in controversy in this case was not a mortgage or deed of trust in the nature of a mortgage but an absolute deed of trust.'

"The judgment of the trial court in the case at bar is contrary to law and must be set aside. Judgment reversed, with instructions to sustain appellants separate and several motions for a new trial, and for further proceedings in accordance with this opinion."

Rooker v. Fidelity Trust Co., 185 Ind. 172, 181-188.

JOINT SECOND AMENDED COUNTER CLAIM.

Following the return of the case from the Supreme Court, the joint "second amended counter claim" appeared in the record. It was filed June 27, 1917, by the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. It averred the execution of the trust agreement and deeds of October 11, 1909, and recited them at large. It averred:

"That as agreed said cross-plaintiff, Fidelity Trust Company, upon execution of said deeds and agreement or memorandum, immediately credited said Dora E. Rooker with said sum of six thousand dollars and thereafter paid from time to time upon the written order and direction of said Dora E. Rooker, the sum of six thousand dollars for and on account of the erection and construction of said dwelling house, outbuildings and improvements and installation thereof, and also paid out and expended further and additional sums of money upon the written order of said Dora E. Rooker in order to protect the title and its interest in and to said real estate as hereinafter specifically enumerated and set forth, to-wit: (Here follows a recital of written orders of Dora E. Rooker, paid) * * * * * * "That in said deeds of conveyance * * * * it was provided that in the event any liens or charges against said real estate be paid by the Fidelity Trust Company, trustee, the said Fidelity Trust Company, trustee, shall be subrogated to all the rights, title, and interest of such original lien holder and the same to be collectible and enforceable in its hands together with interest thereon at the rate of six per cent. per annum, to said Fidelity Trust Company, and that in said memorandum * * * * it was also further provided that said Fidelity Trust Company may let out any such further sum or sums of money other than the sum of six thou-

sand dollars already referred to as said trust company may deem necessary to protect its interest in and to said real estate and it was further provided that every such advancement or payment so made should be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her written direction. And said Fidelity Trust Company now avers and shows to the Court that after the execution of said deeds and memorandum it did let out and expend for the purpose of discharging liens and charges against said real estate, and to protect its interest in and to said real estate, the following amounts, to-wit: (Here follows a recital of various items beginning with March 19, 1913, the purchase of a judgment) * * "That the amounts so paid out and advanced by the cross-plaintiff Fidelity Trust Company, on account of interest, taxes, mortgages and other liens against said lands, aggregate a total of $20,158.04." (Here follows recitals as to attorney's fees, abstracts of title, telephone calls, automobile hire, advertising, etc.) "That all the aforesaid sums of money were advanced by the cross-complainant Fidelity Trust Company in its corporate capacity proper from its own separate funds, pursuant to the memorandum or agreement of trust hereinbefore set forth and upon the security of said Hamilton and Marion county lands * * * and were all advanced and expended for the separate use and benefit of the cross-defendant, Dora E. Rooker, and her own separate estate, and constitute a charge against said Hamilton and Marion county real estate and the proceeds of the sale thereof. And the cross-complainant avers that all the sums so advanced and expended, etc., with interest thereon, etc., are secured by said Hamilton and Marion county lands conveyed to the Fidelity Trust Company as trustee by the deeds of conveyance, etc., and the proceeds of sale thereof, and that as to all amounts paid out to

discharge mortgages, etc., it is subrogated to all of the original holders thereof; that the cross-plaintiff as trustee holds the title to said Hamilton and Marion county real estate absolutely in fee simple for the purpose of said trust, and that to provide for the payment of all said sums so advanced and expended as hereinbefore set forth, the cross-complainant as trustee has given notice to the cross-defendant that ninety days after the delivery thereof it will proceed to publicly advertise said Marion county real estate and sell the same in the manner pursuant to and under the authority which the cross-complainant has under said agreement. And cross-complainant further avers and charges that if said Marion county real estate does not fetch enough to pay the moneys and discharge the obligations charged upon and against the said real estate held by the cross-complainant as trustee, then it will be compelled to and will, to carry out said trust, proceed to sell said Hamilton county real estate as in said memorandum of agreement of trust provided to be done; * * * that the cross-defendants have ever since the execution of said deeds and contract, retained possession of said Hamilton and Marion county lands and are now in possession thereof, and that the cross-complainant has not received and is not chargeable with any of the profits of said lands; that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed; that cross-complainant also is entitled to an accounting.

"Wherefore the cross-complainant prays for an accounting and for judgment for the amount advanced, laid and expended, together with interest and commission, and that the judgment be decreed a lien and charge against the said lands and funds arising from the sale thereof, and that the proceeds of the sale or sales of said real estate be ordered applied as in said

memorandum or agreement of trust provided, and for any and all other proper relief."

Printed Tr., pp. 65-141.

MOTIONS AND PLEAS TESTING THE THEORY OF THE DEFENSE.

It is the law of Indiana that (1) a pleading must proceed upon a single and definite theory and be good on that theory or go out of the record, and (2) that the recovery must be had according to the theory of the issue tendered or not at all. The courts state this rule to be that the recovery must be *secundum allegata et probata*. In contemplation of these rules of law in Indiana there were various motions and pleas directed by the plaintiffs in error to this so-called second amended counter claim. Some of these motions and pleas resembled duplications, and whether or not they were duplications depends upon whether the Fidelity Trust Company is in this case in two capacities, viz: (1) in its corporate capacity proper as it describes itself, and (2) in its special capacity as trustee of the estate of Dora E. Rooker.

For convenience we here recite the substance of one of each of these various motions and pleas, to-wit:

THE MOTIONS TO MAKE MORE SPECIFIC.

On August 4, 1917, the plaintiffs severaly moved "the court for an order to require the defendant, Fidelity Trust Company, to make more certain and specific as t each of the several particulars hereinafter respectively enumerated, its second amended counter claim * * * to-wit:

"First: If it be true, as said counter claim says it is true, that the defendant "has fully and duly performed all of the conditions on its part to be by it performed," then state the facts which cause or excuse, as the case may be, the delay on your part in closing

up the affairs of said trust, during the time of which delay interest charges have accumulated against said trust estate, you say, in the aggregate sum to-wit ten thousand dollars.

"Second: State the facts which cause, or excuse, as the case may be, your failure to apply the proceeds of any sale or sales of said real estate made pursuant to said trust agreement as follows, to-wit: (1) To the payment of any mortgage, or other valid lien, charge, adverse interest or incumbrance upon and against said real estate or any part of the real estate herein described, which may be prior and superior and adverse to the interest of the Fidelity Trust Company; (2) To the payment of the money advanced by second party to first parties or paid to the use and benefits of first parties as in said trust agreement authorized and provided; (3) To the payment or moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her note as in said trust agreement authorized and provided; (4) To the payment to said Dora E. Rooker, her heirs, executors, administrators and assigns the rest and residue remaining of any money arising from the sale of said real estate.

"Third: State the facts which cause or excuse as the case may be, the maturity of the debt which you charge against the plaintiffs.

"Fourth: State the date on which matured, if at all, the debt which you charge against the plaintiffs.

"Fifth: State the facts which constitute the duty and necessity, if any, on your part to have employed attorneys, viz: Mr. Henry Seyfried and Messrs. Kane and Kane, on the occasion when and for the service in which they were so employed.

"Sixth: If it be not in fact true, as stated by you to be true, that you have fully and duly performed all of the conditions of said trust agreement on your part to

be performed, then state the facts, if any, in the conduct, action, or behavior of these plaintiffs or either of them, which constitute the cause, or excuse, as the case may be, the failure on your part to carry out and perform the conditions of said trust agreement on your part to be performed.

"Seventh: If it be not in fact true, as stated by you to be true, that you have fully and duly performed all the conditions of said trust agreement on your part to be performed, and if such failure on your part be not due to the conduct, action, or behavior of these plaintiffs or either of them, then state the facts which constitute your failure to carry out and perform the conditions of said trust agreement on your part to be performed.

"Eighth: As to the alleged interest designated in said counter claim as the American Central Life Insurance Company mortgage, state the fact or facts which constitute your rights to have acquired said mortgage by purchase and assignment and your right now to assert said mortgage interest as one hostile and adverse to your said interests and duty as trustee under and by virtue of said trust agreement, or, in the alternative, if said mortgage was by you acquired as an act of repudiation or in furtherance of an act of repudiation on your part of said trust agreement, then state such, all such facts as an alternative showing, all to the end that these plaintiffs may be advised whether said mortgage is pleaded as a fact within the terms of said trust or as a fact hostile and adverse to said trust."

The motion was overruled and plaintiffs excepted.

Printed Tr., pp. 145-7.

TO STRIKE OUT THE JOINT COUNTER CLAIM.

On October 23, 1917, the plaintiffs severally moved the court for an order to strike from the files the joint

second amended counter claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. The substance of this motion was to the effect following:

"That said joint second amended counter claim is vague, indefinite and uncertain and tenders no issue; that in the nature of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance by said defendants jointly of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by certain of the parties hereto, viz: these plaintiffs and said trustee, or (2) upon the single and definite theory of a *quantum meruit* with valuation as fixed by the said trust agreement and founded upon the partial and incomplete performance by said defendants jointly of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of a *quantum valebat* founded upon acts done by the said defendants jointly to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate has accepted, retained and appropriated to its own use, benefit and advantage; that said joint second amended counter claim avers facts inconsistent with and contradictory of the statement therein, "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed," and that because of such inconsistencies and contradictions, the

said averment is nullified and destroyed, to-wit, the averment, "that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed," and that in the premises there is no issue tendered by the said second amended counter claim that the said defendants are entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendants of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendants upon said counter claim; that said joint second counter claims avers no fact in excuse of the failure on defendants' part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendants are entitled herein to employ said trust agreement to fix the value, as upon a *quantum meruit*, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement, and these plaintiffs say that in the premises there is no issue tendered by said joint second amended counter claim that the said defendants are entitled to any recovery whatsoever, as upon an issue the *quantum meruit*, against these plaintiffs in favor of said defendants upon said counter claim; that said joint second amended counter claim avers no fact founded upon acts done by said defendants jointly to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by the said defendants to the damage of said trust estate and which said excess in value of benefits over damages the said estate has accepted, retained and appropriated to its own use, benefit and advantage; that upon the facts in the premises the said joint second amended counter claim

tenders no issue whatsoever in favor of said defendants and is useless and can accomplish no proper and lawful purpose in this cause, and is needless encumbrance of the record and should be stricken from the files herein."

The motion was overruled and plaintiff excepted.

Printed Tr., pp. 157-8.

REPLIES TO THE COUNTER CLAIM.

On October 23, 1917, the plaintiffs filed their replies in separate and several partial defenses to so much of the second amended counter claim as was made by the defendant in its capacity as trustee and as first paragraph of plaintiffs' several separate and partial replies thereto, respectively, said:

1. "That they severally deny each and every allegation contained in said second amended counter claim of said defendant as trustee save and except so much thereof as in this paragraph of partial reply is expressly admitted to be true and for their express admissions these plaintiffs say that it is true that on the 11th day of October, 1909, they executed with and to the defendant as trustee, in writing their certain instrument called a trust agreement and concurrently therewith and as part thereof their certain deeds of conveyance of certain described lands to the defendant as trustee, and that said trust agreement and said deeds of conveyance were the same trust deed and agreement and trust deeds which are transcribed into and exhibited by said second amended counter claim."

Wherefore plaintiffs demand judgment as in their complaint prayed.

Printed Tr., pp. 174-5.

2. The second paragraph was a plea of *non est factum* made to meet a clause in the exhibits which did not conform to the truth. The exhibits were corrected

at the trial and, therefore, this paragraph need not be considered now as before the court.

Printed Tr., pp. 175-6.

4. The fourth paragraph was payment.

Printed Tr., p. 176.

5. "Plaintiffs for their fifth and further separate and several partial defenses to so much of the second amended counter claim as seeks to recover a trustee's fee of one hundred and fifty dollars and a commission of two per cent., together with interest at six per cent. computed semi-annually, and together with attorney's fees and other charges and expenses as set forth in said second amended counter claim for the term of one year and during which time said contract was and was to be executory, severally say that said compensation is unlawful and usurious for that said obligations on the part of these plaintiffs was, as more particularly appears from said trust agreement, a copy of which marked Exhibit A is filed with the amended complaint herein, ever upon the express conditions following, to-wit:

"A. Said defendant as trustee promised and agreed in consideration of said compensation to furnish the moneys and means with which to complete said dwelling house and outbuildings appurtenant thereto, and other necessary and proper structures, and to equip the same with modern utilities and conveniences, all to be duly completed and installed, and to furnish the moneys and means necessary to the true and better and complete performance of said contracts of trust and to the successful maintenance of and care for said real estate and the business thereon conducted.

"B. Said defendant as trustee promised and agreed to obtain from other banks and bankers upon the promissory notes of said Dora E. Rooker such sum or sums of money over and above the sum said defendant trustee was to furnish out of its moneys and means, as

should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences, all to be duly completed and installed; and to that end said defendant trustee obligated itself and it became and was its duty to protect the credit of said Dora E. Rooker generally and particularly at banks.

"C. Said defendant as trustee obligated itself and it became and was its duty to protect said real estate and said trust estate against waste and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and against said property.

"D. That said defendant as trustee obligated itself to begin within the period of one year after the execution of said trust agreement to reduce said trust estate to cash and to administer said trust and liquidate its credits and debits in the form and manner prescribed in said contract.

"E. That said defendant as trustee obligated itself to strict fidelity to said trust estate and to the said Dora E. Rooker and William V. Rooker, all to the end that the interests of said trust estate would thereby be the better conserved and said trust the more prudently and advantageously administered.

"Yet notwithstanding the said duties and obligation of said defendant trustee, which it was to do and perform in consideration of and as its compensation to said Dora E. and William V. Rooker for said rates, fees, commission and charges, said defendant trustee failed, neglected and refused to furnish the moneys and means with which to complete said dwelling house and outbuildings appurtenant thereto, and other necessary and proper structures and to equip the same with modern utilities and conveniences, the same to be duly completed and installed, and said defendant trus-

tee failed, neglected and refused to furnish the moneys and means necessary to the true and better and complete performance of said contract of trust and to the successful maintenance of and care for said real estate and the business thereon conducted.

"That said defendant trustee failed, neglected and refused to obtain money from other banks and bankers upon the promissory notes of said Dora E. Rooker and failed, neglected and refused to protect and preserve the credit at bank of said Dora E. Rooker, to the end that she might obtain such sum or sums of money over and above the sum said defendant trustee was to furnish out of its moneys and means as should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, so that the same should be duly completed and installed; but on the contrary, said Fidelity Trust Company in its corporate capacity proper and with the knowledge and consent of said trustee, unlawfully and without right set about to appropriate and convert to itself said trust estate and the better to accomplish such unlawful purpose, it set about to injure and destroy the credit at banks of said Dora E. Rooker and William V. Rooker, and to that end it persistently baffled and annoyed such banks, as the said Dora E. Rooker and William V. Rooker had theretofore satisfactorily done business with and thereby said trust company, with the knowledge, consent and participation of said trustee, greatly impaired and wholly destroyed the credit of said Dora E. Rooker and William V. Rooker at said banks.

"That said defendant trustee wholly failed, neglected and refused to protect said real estate and said trust estate against waste, and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and

against said property; but, on the contrary, said defendant trustee allowed taxes on said real estate to become delinquent, and allowed said property to go without insurance, and refused to pay the written orders of said Dora E. Rooker for sums justly due to claimants against said trust estate, and caused and procured said claimants to file notices of mechanic liens against said trust estate, and to sue thereon and reduce the same to judgment with attorney's fees and costs, and to assign such judgment to said trust company, in its said corporate capacity proper.

"That said defendant trustee wholly neglected, failed and refused to begin within the term of one year to reduce said trust estate to cash and to liquidate said trust in the form and manner prescribed in said contract; but, on the contrary, said defendant trust company, trustee under the domination and control of such trust company in its corporate capacity proper, for the unlawful uses and purposes of said trust company as aforesaid, repudiated its said duties of fidelity and trust, and gave to these plaintiffs notice in writing of such repudiation, a copy of which marked 'Exhibit No. 1,' is filed with the complaint herein; that said trust company and said trustee tendered back said estate grossly wasted and heavily encumbered, and thereupon demanded that these plaintiffs pay forthwith in money the demands of said trust company as a mortgagee; that said notice of repudiation of said trust was served on these plaintiffs before the bringing of this suit.

"That by reason of the premises said defendant trustee has forfeited and waived the consideration upon which it might lawfully demand the collection of the interest rates, commission, fees and charges mentioned in said trust agreement, and by reason thereof said compensation which it now demands is unjust, usurious and unlawful.

"Wherefore plaintiffs demand judgment as in the amended complaint prayed, and that in any decree made and entered herein that no interest in excess of six per cent. per annum be computed in favor of any payment made by said defendant trustee upon its said demand, and they pray for all proper relief."

Printed Tr., pp. 177-9.

6. Plaintiffs, for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as sixth paragraph of replies thereto respectively say: that as to so much of said second amended counter claim as seeks to recover on account of taxes paid by said defendant as trustee, said claim should be disallowed in the form and manner as presented in said second amended counter claim, and that said items as for taxes should be made the subject of an accounting by the court and that each of said items should be reduced, together with the aggregate thereof at least fifty per cent. for the reason that the obligation of said trust estate and the obligations of these plaintiffs to repay such sums as such trust company as trustee might and should lay out and expend for taxes was an obligation ever upon the condition that such expenditure should be made by said trust company as trustee to perform and the better to perform the trust created in and by its certain contract dated October 11, 1909, a copy of which contract, marked "Exhibit A," is filed with the amended complaint herein; that the trust created by said contract was one calling for diligence and fidelity on the part of said trust company as trustee; that said trust company as trustee wrongfully disregarded its duty in the premises and for purposes of its own failed and refused to pay such taxes before the same became delinquent, and penalties were imposed thereon; that each of said items is because of said delinquency excessive in the sum and amount of

to-wit, fifty per cent.; that such delinquency was not the fault or delinquency of these plaintiffs, or either of them, but was solely the fault and delinquency of said trust company as trustee and an act of abuse and mal-administration on its part of said trust for which these plaintiffs are in nowise responsible, and for which said trust estate should not be held liable.

Wherefore, these plaintiffs demand judgment as in the amended complaint prayed, and that an accounting be had and taken of said taxes paid, and that in any allowance made to said trust company as trustee on account of said taxes paid that only such principal sums be allowed as were the principal sums of said taxes before delinquency and before penalties were attached thereto, and plaintiffs pray for all proper relief.

Printed Tr., pp. 179-80.

7. Plaintiffs, for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as seventh paragraph of replies thereto, respectively say: that as to so much of said second amended counter claim as seeks to recover on account of interest paid on prior mortgage liens to the Indianapolis Life Insurance Company and to the American Central Life Insurance Company, these plaintiffs say that said claims should be disallowed in the form and manner as presented, and that an accounting should be had with respect thereto, and that upon such accounting only such principal amount should be allowed as was the principal sum of such interest debt before default and delinquency; that there was a default and a delinquency in the payment of such interest charges and thereupon penalties were attached in the manner and form of eight per cent. interest; that such penalties are not nor were they ever the debt or default of these plaintiffs, or either of

them, but such penalties were the debt and default of said defendant as trustee for that the obligation of these plaintiffs and of said trust estate to repay such sums as said trustee might and should lay out and expend in interest on said prior mortgage liens was an obligation ever upon the condition that such expenditure should be made by said trustee to perform and the better to perform the trust created in and by the contract of said trustee and these plaintiffs dated October 11, 1909, a copy of which contract, marked "Exhibit A," is filed with the complaint herein; that said trust was one calling for diligence and fidelity on the part of said trustee; that said trustee wrongfully disregarded its duties in the premises and for purposes of its own failed and refused to pay such interest charges before the same became delinquent and penalties were imposed thereon; that each of said items is because of such delinquency excessive in the sum and amount of two per cent.; that such delinquency was not the fault or delinquency of these plaintiffs, or either of them, but was solely the fault and delinquency of the trustee and an act of abuse and mal-administration on its part of said trust estate for which these plaintiffs are in nowise responsible, and for which said trust estate should not be held liable.

Wherefore, these plaintiffs demand judgment as in the amended complaint prayed for; that an accounting be had and taken of said interest charges paid, and that in any allowance made to said defendant as trustee on account of interest charges paid that only such principal sums be allowed as were the principal sums of such interest charges before delinquency and before penalties were attached thereto, and plaintiffs pray for all proper relief.

Printed Tr., pp. 180-1.

8. Plaintiffs, for their further separate and several partial defenses to so much of the second amended

counter claim as is made by the defendant in its capacity as trustee and as eighth paragraph of replies thereto, respectively, say: That as to so much of said second amended counter claim as seeks to recover the principal sum of four hundred dollars specified in said second amended counter claim and the exhibits filed therewith as a payment made to George W. Keyser, voucher 31, February 24, 1910, upon the written order of Dora E. Rooker on account of plumbing done in the erection and construction of the dwelling house of the said Dora E. Rooker, these plaintiffs say that said claim should be wholly disallowed as set off and fully paid upon the facts in the premises following, to-wit: That the obligation of these plaintiffs to repay such sum as said trustee may have paid said Keyser was an obligation ever upon the condition that such expenditure should be made by said trustee to perform, and the better to perform, the trust created in and by said contract of said trustee with these plaintiffs, dated October 11, 1909, a copy of which contract, marked "Exhibit A," is filed with the complaint herein; that in and by said contract it was the duty of said trustee to furnish upon the written order of said Dora E. Rooker moneys with which to perform and the better to perform the trust created in and by said contract, and which trust was one calling for fidelity on the part of said trustee in aiding and assisting said Dora E. Rooker to erect and construct the dwelling house and outbuildings appurtenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences in the completion and installation thereof; that said Dora E. Rooker had theretofore duly entered into a contract in writing with said George W. Keyser to furnish all labor, material and fixtures for the plumbing work and the water and sewage system of her said dwelling house, all at an agreed price of nine hundred and eighty-eight dollars; for which said

Dora E. Rooker agreed to pay said Keyser in installments; that after said Keyser had purchased his unfitted and unmade material, and a part thereof had been delivered on the premises of the said Dora E. Rooker for the use in the premises, and after said Keyser had done a small amount of the work of laying pipe and making fittings, it became and was the duty of said Dora E. Rooker to issue to said Keyser her written order upon said trustee in the sum of four hundred dollars ($400) and in part performance of her said contract with said Keyser; that said Dora E. Rooker did in good faith execute her said order to said Keyser and said Keyser in good faith accepted said order; that said trustee wrongfully in disregard of its duties and in violation of the rights of the said Dora E. Rooker, refused to pay said order or any part thereof, but compelled the said Keyser to employ attorneys at great expense to enforce the collection of such order; that said Keyser did employ such attorneys to enforce the collection of such order; that thereupon said trustee wrongfully coerced, forced, required and prevailed upon and induced said Keyser to abandon his said contract with the said Dora E. Rooker to furnish all labor, material and fixtures for the plumbing work and the water and sewage system of her said dwelling house, and said trustee further wrongfully in disregard of its duties and in violation of the rights of said Dora E. Rooker in the premises prevailed upon and induced, coerced, forced and required said Keyser to file a notice of his intention to hold a mechanic's lien against the said premises of said Dora E. Rooker for said work and labor and material furnished, and said Keyser did file such notice of his intention to hold a lien, in the office of the Recorder of said Hamilton county, Indiana; and said trust company thereupon with the knowledge and consent of said trustee, wrongfully prevailed upon said Keyser to assign said pretended lien

and said builder's contract to said trust company in its corporate capacity proper, and thereupon said Keyser and said trust company wholly and finally abandoned said contract and the performance thereof, and that by reason of the premises said dwelling house, instead of being equipped with modern conveniences and utilities completed and installed, contains only a few disconnected and broken lot articles of plumbers' materials and supplies, and the same are wholly useless to said dwelling house and are of no value therein; that soon thereafter the said Keyser departed this life; that the said price at which said Keyser had undertaken and agreed to do said work and labor and furnish said materials as in his said written contract set forth and provided was highly advantageous to said Dora E. Rooker and to said trust estate; that the reasonable worth and value of the said work and labor which said Keyser had so agreed to do and of the said materials which he had so agreed to furnish was and is two thousand dollars, which said sum is wholly lost to said Dora E. Rooker and to said trust estate by reason of the said wrongful and unlawful conduct of the defendants; that by reason of the said wrongful acts of said trust company, the said Dora E. Rooker was obstructed in her right and prevented by said trust company from enforcing her said contract against said Keyser, and said plumbing work became and is incompleted, disconnected and useless, all to the damage of said Dora E. Rooker fifteen hundred dollars ($1,500.00).

Wherefore plaintiffs demand judgment as in the amended complaint prayed, and they ask that said item of four hundred dollars ($400.00) be wholly disregarded and that for said item and on this paragraph they be allowed judgment over for fifteen hundred dollars, and they ask for all proper relief.

Printed Tr., pp. 181-3.

9. Plaintiffs, for their further separate and several

partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as ninth paragraph of replies thereto respectively say: That as to so much of said second amended counter claim as seeks to recover the principal sum of one hundred and eighty-four dollars and fifty cents ($184.50) designated in said cross-complaint as Voucher 32, April 11, 1910, Lacy Seed and Hay Company, upon the written order of Dora E. Rooker for seed purchased to be used on the farm of said Dora E. Rooker, these plaintiffs say that such claim should be disallowed for the reason that the obligation of these plaintiffs and the obligation of said trust estate to repay such sum as said trust company might and should pay out on said order of said Dora E. Rooker was an obligation ever upon the condition that said expenditure should be made by said trustee to perform, and the better to perform, the trust created in and by said contract by said trustee with these plaintiffs, dated October 11, 1909, a copy of which contract, marked "Exhibit A," is filed with the amended complaint herein; that said contract for the performance of said trust was a contract calling for fidelity and diligence on the part of said trustee in aiding and assisting the said Dora E. Rooker to meet her obligations and to accomplish the true and better and complete performance of said trust agreement, and to the successful maintenance of and care for said real estate and the business thereon conducted; that said voucher was given in payment for seed oats; that in March prior to the issuance of said voucher these plaintiffs duly notified said trust company of their purpose and of the advisability of seeding to oats twenty acres of said trust lands situate in Marion county and forty acres of said trust lands situate in Hamilton county, and that these plaintiffs had neither seed oats nor the available moneys with which to purchase seed oats;

that thereupon said trustee consented and agreed to honor and pay a voucher for said seed oats duly upon presentation; that thereupon these plaintiffs at a cost and expense of, to-wit, two hundred dollars ($200.00) caused and procured said sixty acres of said land to be broken and prepared for seeding to oats; that said work was well and seasonably done; that thereupon said Dora E. Rooker presented her said vouchers to said trustee for the amount required to purchase said seed oats; that said trustee failed and refused to honor and pay said voucher for a long time, to-wit, one month; because of such delay the proper time for seasonably seeding such oats under ordinary conditions passed; that plaintiffs desiring to save themselves the loss that would ensue from the abandonment of said fields so prepared for oats, sowed the same, relying upon the reasonable chances that favorable weather conditions might prove propitious for the growth of said crop; that said oats grew and matured into a subnormal but reasonably fair crop of, to-wit, thirty bushels per acre; that upon the maturity of said crop said trustee in violation of the rights of these plaintiffs and in wrongful disregard of its said duties failed and refused to provide any means whatever for the harvesting of said crop; that by reason of said trustee's said wrongful acts, said crop remained unharvested and was wholly wasted and lost, and plaintiffs were required to and did sustain and suffer loss of time, labor and expense in preparing said land for said oats crop, and they in like manner and for the same reasons sustained and suffered the loss of said land for the season, all to their damage in the sum of one thousand five hundred dollars ($1,500.00).

Wherefore plaintiffs demand judgment as in the amended complaint prayed, and they ask that said item of one hundred and eighty-four dollars and fifty cents ($184.50) be wholly disallowed as a claim against said

trust estate, and that judgment ever be awarded on this paragraph in the sum of one thousand three hundred dollars ($1,300.00), and they pray for all proper relief.

Printed Tr., pp. 183-4.

10. Plaintiffs, for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as tenth paragraph of replies thereto, respectively say: That as to so much of said counter claim as seeks to recover the principal sum of five hundred dollars specified in said counter claim as Voucher No. 43, dated August 26, 1910, payable to the Illinois Surety Company, and as to so much of said counter claim as seeks to recover the principal sum of four hundred and forty-two dollars and forty-two cents, specified in said claim as Voucher No. 78, dated June 25, 1913, payable to Will F. Wall, clerk, and to so much of said counter claim as seeks to recover the principal sum of twenty-eight dollars and seventy cents specified in said counter claim as Voucher No. 79, dated June 25, 1913, payable to J. Fred France, clerk, plaintiffs say that said items should be disallowed in the form and manner as presented in said counter claim, and that said items should be made the subject of an accounting by the court, and that said item of five hundred and five dollars specified in said Voucher No. 43 to Illinois Surety Company should be wholly disallowed; that said three items are one and the same transaction and represent one and the same liability, varying only in point of time, and as the facts in the premises occurred which were as follows, to-wit: On the 27th day of January, 1910, in and by the judgment of this court in Cause No. 15246 the Ludowici-Celadon Company recovered against these plaintiffs the principal sum of three hundred and forty-seven dollars and forty-one cents, with costs taxed at ————————

dollars, and for the foreclosure of a mechanic's lien on lands embraced within this trust and situate in said Hamilton county; that these plaintiffs, desiring to appeal from said judgment, procured the Illinois Surety Company to become surety on their appeal bond in the manner following, to-wit: Said defendant trust company in consideration of its interest in the premises and in consideration of its use of the money at low rate of interest during the time engaged, but being by law disqualified from entering into contracts of indemnity undertook to honor the order of the said Dora E. Rooker for the principal sum of five hundred and five dollars ($505.00) ever, however, upon the said condition that said surety company should not cash such order nor withdraw the funds thereby represented from said trust company, but on the contrary, said surety company should deposit said order with said trust company and take a certificate of deposit in lieu of such an order, and that such surety company should not cash such certificate, but should permit the same to be and remain on deposit with said trust company, and to bear interest at the rate of four per cent. per annum, credited semi-annually to the use and benefit of said trust estate until the proceeds thereof were required to pay said judgment and costs on affirmance and to liquidate and pay the costs, expenses, premiums and other proper charges which said trust company was to pay on account of said judgment, interest and costs on the affirmances thereof and to account to the said Dora E. Rooker and trust estate for the residue of said deposit with interest thereon at four per cent., and said surety company was thereupon to release its interest therein; that said surety company thereupon, in performance of said agreement, accepted the said written order of Dora E. Rooker and deposited the same with said trust company and took a certificate of deposit for five hundred dollars ($500.00), being the

full amount of said order less five dollars ($5.00) for the annual premium payable to said surety company; that said deposit remained in said trust company until on, to-wit, the 25th day of June, 1913; that said judgment was affirmed on, to-wit, the ———— day of 1913; that thereafter said trust company paid said judgment and costs, but as to the residue of said deposit, in the principal sum of twenty-eight dollars and eighty cents with interest in the sum of fifty-six dollars and fifty cents and all in the aggregate of eighty-five dollars and thirty-eight cents ($85.38); said trust company and said surety company each endeavored to convert and appropriate to its own use, and each failed and refused to account to these plaintiffs, or to either of them or to said trust estate for said residue; that thereafter said trust company and said surety company became involved in litigation over said residue, and to such litigation these plaintiffs were made parties defendants; that said litigation was in the Superior Court of Marion county, Indiana, as Cause No. 91178, entitled *Fidelity Trust Company vs. Illinois Surety Company, et al.;* that in said action said surety company by its cross-complaint sought to recover against these plaintiffs a large sum, to-wit, one hundred dollars ($100.00) for its premiums and its attorney's fees in said action; that plaintiffs were required to lay out and expend a large sum, to-wit, one hundred dollars ($100.00) for attorney's fees and expenses, in and about their defense of said suit; that said expense was reasonable and was necessarily incurred by these plaintiffs; that the same was due wholly to the said default of said trust company; that said trust company is and should be held to be liable therefor; and that an accounting should be had and taken as to the said fund, and that these plaintiffs should have judgment accordingly.

Wherefore, plaintiffs demand judgment as in the

complaint prayed, and they ask that an accounting be had and taken as to said items; that the damage of these plaintiffs should be ascertained and assessed against said trust company, and these plaintiffs pray for all proper relief.

Printed Tr., pp. 184-6.

11. Plaintiffs for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as eleventh paragraph of replies thereto, respectively say: That as to so much of said counter claim as seeks to recover the principal sum of five hundred and seventy-one dollars and twenty-one cents ($571.21), specified in said second amended counter claim and the exhibits filed therewith as a payment made to Balke-Krauss Company, Voucher 53, March 17, 1913, for assignment of judgment and lien in foreclosure against Dora E. Rooker in the Hamilton Circuit Court and also to so much of said cross-complaint as seeks to recover the principal sum of fifty dollars ($50.00) specified in said second amended counter claim and in the exhibits filed therewith as a payment made to Kane and Kane for legal services, Voucher 83, November 26, 1912, and also to so much of said counter claim as seeks to recover the principal sum of one hundred dollars specified in said counter claim as a payment made to Henry Seyfried for legal services, Voucher 84, March 19, 1913, these plaintiffs say that said items are all one and part of the same transaction and should be disallowed in the form and manner as presented in said counter claim, and that said items be taken together should be made the subject of an accounting by the court, and that said attorney's fees should be disallowed wholly and that said payment to Balke-Krauss Company should be reduced to the principal sum of four hundred and eighty-three dollars ($483.00) as against which these plaintiffs

should be allowed an additional and further off-set in the sum of one hundred and fifty dollars ($150.00) upon the facts following, to-wit: that the obligation of these plaintiffs and the obligation of said trust estate to repay such sums as said trustee might and should lay out and expend with respect to said trust estate was an obligation ever upon the condition that such expenditures should be made by said trust company to perform and the better to perform the said trust created in and by said contract, which said trust was one calling for diligence and fidelity on the part of said trust company, all as more fully appears in said trust agreement, a copy of which, marked "Exhibit A," is filed with the amended complaint herein; that in and about the erection and construction of her said dwelling house, the said Dora E. Rooker became indebted to said Balke and Krauss Company in the sum of, to-wit, four hundred and eighty-three dollars ($483.00); that on, to-wit, the ———— day of ————————, 1912, the said Dora E. Rooker executed to said Balke and Krauss Company her written order on said trust company to pay to said Balke and Krauss Company on demand said sum of four hundred and eighty-three dollars ($483.00); that said trustee without right dishonored said order and refused to pay the same, but wrongfully violating the rights of these plaintiffs and wrongfully disregarding its own duties in the premises, said trustee and said trust company caused and procured said Balke and Krauss Company to encumber said real estate with a notice of intention to hold a mechanic's lien on said premises, and notwithstanding said trustee and said trust company well knew that there was no defense whatever to said demand of said Balke and Krauss Company, said trustee and said company caused and procured said Balke and Krauss Company to institute and prosecute to judgment an action to fore-

close said lien; that said trustee and said trust company caused and procured said Balke and Krauss Company to make the said Dora E. Rooker a party to said suit; that her attorneys' fees and expenses in and about the defense of said action were reasonably worth one hundred and fifty dollars ($150.00); that on the trial of said cause attorneys' fees as provided by the statute were added in favor of said Balke and Krauss Company by the court of, to-wit, seventy-five dollars ($75.00); that said trust company employed said Kane and Kane and said Seyfried to defend said action, but their services were wholly fruitless and worthless, but nevertheless said trust company paid to said Kane and Kane said item of fifty dollars ($50.00) represented in and by said Voucher 83, and paid to said Seyfried said item of one hundred dollars ($100.00) represented in and by said Voucher 84, and said items 83 and 84 were paid for no other services; that thereafter said trustee and said trust company in further wrongful disregard of said trustee's duties in the premises and in violation of the rights of these plaintiffs, and seeking to speculate against the estate of said trust and seeking how said trust company might by sale on execution and decree on said judgment circumvent the clause of sale in said trust agreement, marked "Exhibit A," caused and procured said Balke and Krauss Company to execute its assignment of said judgment and lien to said trust company while said Balke and Krauss Company continues to hold the said Dora E. Rooker's said order for the payment of said money; that it never was any part of the obligation of these plaintiffs, or of either of them, or of said trust estate, to pay out of said trust estate or under said trust agreement any such claims or demands as said trust company might acquire either by purchase adversely to said trust estate or for the purpose of its own speculation.

Wherefore, these plaintiffs demand judgment as in the amended complaint prayed that said items specified by said Vouchers 53, 83 and 84 be wholly disallowed and subject to an accounting, and that plaintiffs be awarded judgment, and they pray for all proper relief.

Printed Tr., pp. 186-7.

12. Plaintiffs, for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as twelfth paragraph of replies thereto, respectively say: That as to so much of said counter claim as seeks to recover the principal sum of forty dollars and sixty-four cents, the same being composed of the following items, to-wit: [Here follows a specification; Vouchers 85-100, aggregating $40.64.] These plaintiffs say that said items should be disallowed wholly for the reason that as to these plaintiffs and to said trust estate said items were wholly without consideration and for the further reason that the obligation of these plaintiffs to repay and the obligation of said trust estate to repay such sums as said trustee might and should lay out and expend was ever upon the condition that such expenditures should be limited strictly to such as should be made to perform, and the better to perform, a certain contract of trust evidenced by a memorandum in writing executed by these plaintiffs and said trustee on October 11, 1909, a copy of which memorandum, marked "Exhibit A," is filed with the complaint herein; that said trust contract was one calling for competency and fidelity on the part of said trust company; that the said items are not nor is either of them a charge or lien against said land or an item that arises out of the preservation of said trust estate or that arises out of the carrying on of the business conducted of said trust estate on said lands; that said items of expenditures laid out and incurred, if at all laid out and incurred, were laid out and incurred by

said trust company in the conduct of its own affairs and in the promotion of its own interests and in the accomplishment of its own purposes and for which as to said trustee compensation was made contractual by said trust agreement.

Wherefore these plaintiffs demand judgment as in the amended complaint prayed and that said items be disallowed, and they pray for all proper relief.

Printed Tr., pp. 188-9.

13. Plaintiffs, for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as thirteenth paragraph of replies thereto, respectively say: That as to so much of said counter claim as seeks to recover as for insurance premiums paid, the principal sum of one hundred and thirty-six dollars and fifty cents, the same being composed of the following items, to-wit:

Voucher	*Date*	*Payee*	*Amount*
80	October 17, 1914,	Fidelity, etc., Co.	$96.00
81	April 28, 1916,	Fidelity, etc., Co.	40.50
	Total		$136.50

Plaintiffs say that said items should be wholly disallowed for the reason that the obligation of these plaintiffs and of said trust estate to repay any moneys said trustee might and should lay out and expend was ever and solely for the consideration and upon the conditions stated in said trust agreement, a copy of which, marked "Exhibit A," is filed with the amended complaint herein; that in and by said agreement, said trustee obligated itself to strict fidelity to these plantiffs and to said trust estate, all to the end that the interests and welfare of said trust estate should thereby be the better conserved and the said trust the more prudently managed and its affairs the more efficiently and advantageously administered; that the said obligation of

said trustee and the faithful performance of such obligation were the consideration of said trust agreement, and among the conditions precedent to the duty of these plaintiffs and of said trust estate to repay any moneys which said trustee might and should lay out and expend by virtue of its office as such trustee; but, plaintiffs say, the said moneys mentioned in this paragraph of reply were not laid out and expended by said trustee in the performance of its said duties to said trust estate and to these plaintiffs as beneficiaries of said trust estate; but, on the contrary, said trustee, in wrongful disregard of its said duties in the premises and in unlawful violation of the rights of these plaintiffs and of said trust estate in the premises, did on, to-wit, the 28th day of October, 1917, wrongfully and unlawfully enter into a scheme and collusion with said Fidelity Trust Company in its corporate capacity proper to the purpose and intent that said trust company in its corporate capacity proper, should acquire as its own gain, advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that in and about the carrying out and accomplishing of said scheme and collusion said trustee agreed to and with said Fidelity Trust Company in its corporate capacity proper, that said trustee should abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the premises arising out of said trust agreement and, accordingly, said trustee did abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the said affected premises and thereupon said trustee joined with said Fidelity Trust Company in its corporate capacity proper in serving a written notice upon these plaintiffs of such disaffirmance, abandonment and repudiation of said trust agree-

ment and of the duties and obligations of said trustee thereunder; that a copy of said written notice of disaffirmance, abandonment and repudiation, marked "Exhibit A," is filed with the amended complaint herein; that thereafter in further carrying out said unlawful scheme and collusion, said Fidelity Trust Company, in its corporate capacity proper, brought its action as a cross-complaint against these plaintiffs in this suit and caused and thereupon procured said trust agreement to be foreclosed as a mortgage against said trust estate and upon decretal sale caused and procured said trust estate to be sold as other lands are sold on execution and under and by virtue of such decretal sale caused and acquired the title of in and to said trust estate to be acquired by and vested in said Fidelity Trust Company in its corporate capacity proper; that the said acquisition of said title of and to said trust estate was an unlawful appropriation and conversion of said trust estate and the property and value thereof by said Fidelity Trust Company in its corporate capacity proper; that while said title to said property of said trust estate was so unlawfully held by said trust company in its corporate capacity proper, the said insurance was affected, which is designated in said Vouchers, Nos. 80 and 81; that said insurance premiums so paid, if paid at all, were paid by said Fidelity Trust Company in its corporate capacity proper, were voluntary payments on its part and were in the aid and advancement of said trust company's own wrong in the wrongful and unlawful carrying out of said scheme and collusion and were not at the time they were made, if they ever were made, nor are they now an obligation and liability of or charge against said trust estate, and said items should be disallowed wholly in this action.

Wherefore plaintiffs demand judgment as in their complaint prayed and on this, their thirteenth para-

graph of replies, they ask that the said items herein described be disallowed wholly.

Printed Tr., pp. 189-90.

14. Plaintiffs, for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as fourteenth paragraph of replies thereto, respectively say: That as to so much of said counter claim as seeks to recover the principal sum of fourteen thousand four hundred and twenty-four dollars and fifty cents, purporting to have been paid to the American Central Life Insurance Company as and for the principal and accrued interest of a certain described mortgage, and designated in said counter claim as a payment made on November 21, 1913, Voucher Exhibit No. 82, which said mortgage purports to be set forth at large as "Exhibit A" in said counter claim, plaintiffs say that said item should be wholly disallowed for the reason that the obligation of these plaintiffs and of said trust estate to repay any moneys said trustee might and should lay out and expend was ever and solely for the consideration and upon the conditions stated in said trust agreement, a copy of which, marked "Exhibit A," is filed with the amended complaint herein; that in and by said trust agreement said trustee obligated itself to strict fidelity to these plaintiffs and to said trust estate, all to the end that the interests and welfare of said trust estate should thereby be the better conserved and the said trust the more prudently managed and its affairs the more efficiently and advantageously administered; that the said obligations of said trust and the faithful performance of such obligations were the consideration of said trust agreement and among the conditions precedent to the duty of these plaintiffs and of said trust estate to repay any moneys which said trustee might and should lay out and expend by virtue of its office as such trustee; and

in and about performing its duties to said trust estate and to these plaintiffs and other beneficiaries of said trust; but, plaintiffs say, the said moneys mentioned in this paragraph of reply were not laid out and expended by said trustee in the performance of its duties to said trust estate and to these plaintiffs and others as beneficiaries of said trust estate, but, on the contrary, said trustee, in wrongful disregard of its said duties in the premises to said trust estate and in unlawful violation of the rights of these plaintiffs and of said trust estate in the premises, did, on, to-wit, the 28th day of October, 1912, wrongfully and unlawfully enter into a scheme and collusion with said Fidelity Trust Company in its corporate capacity proper to the purpose and intent that said trust company, in its corporate capacity proper, should to itself sequester and acquire as its own gain, advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that in and about the carrying out and accomplishing of said scheme and collusion said trustee agreed to and with said Fidelity Trust Company, in its corporate capacity proper, that said trustee should abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the premises arising out of said trust agreement and, accordingly, said trustee did abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the said affected premises and thereupon said trustee joined with said Fidelity Trust Company in its corporate capacity proper in serving a written notice on these plaintiffs of such disaffirmance, abandonment and repudiation of said trust agreement and of the duties and obligations of said trustee thereunder; that a copy of said written notice of disaffirmance, abandonment and repudiation,

marked "Exhibit A," is filed with the complaint herein; that thereupon said trust company in its corporate capacity proper unlawfully and wrongfully set about to sequester and acquire to itself and did accordingly acquire to itself as its own gain, advantage, profit and riches, the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that in and about the said carrying out and accomplishing of said scheme and collusion and in and about the said unlawful and wrongful appropriation and conversion by said trust company in its corporate capacity proper of the said entire property and value of said trust estate, said trust company in its corporate capacity proper, purchased or otherwise acquired each and every such right, title and interest as it now may have or at any time heretofore may have had in and to said so called American Central Life Insurance Company mortgage and to any part thereof; that any sum which may have been paid, or agreed to be paid, by said trust company, if paid at all, was paid by said trust company in its corporate capacity proper, and was a voluntary payment on its part and was in aid and advancement of said trust company's own wrong in the wrongful and unlawful carrying out of said scheme and collusion and was not at the time it was made, if it ever was made, an obligation and liability of nor charge against said trust estate; that said pretended mortgage was long past due and the validity thereof was then and there the subject of pending litigation between the said Dora E. Rooker and said American Central Life Insurance Company long prior to and at the time said trust company acquired, if it did acquire, any interest therein; that of all the facts in the premises affecting said pretended mortgage said Fidelity Trust Company in its corporate capacity proper, had due and timely notice and by

reason thereof it took and acquired any and every such interest as it may have taken and acquired in said mortgage and said mortgage debt by written assignment from said American Central Life Insurance Company without recourse on it, the said assignor; that said items set forth in said counter claim as and for the acquisition, payment, extinction or whatsoever it may be of said so called American Central Life Insurance Company mortgage are wrongful and unlawful charges herein and should be disallowed wholly.

Wherefore plaintiffs demand judgment as in their amended complaint prayed and on this their fourteenth paragraph of replies they ask that said items herein described be disallowed wholly.

Printed Tr., pp. 190-2.

15. Plaintiffs, for their further separate and several partial defenses to so much of the second amended counter claim as is made by the defendant in its capacity as trustee and as fifteenth paragraph of replies thereto, respectively say: That as to so much of said counter claim as seeks to recover on each and every of the certain items severally of purported payment made subsequent to the 28th day of October, 1912, the same being severally more particularly designated by the following described exhibits, towit: (Here follows specification of vouchers 53-92, aggregating $18,489.31.)

Plaintiffs say that each of said several items should be wholly disallowed for the reason that the obligation of these plaintiffs and of said trust estate to repay any moneys said trustee might and should lay out and expend was ever and solely for the consideration and upon the conditions, stated in said trust agreement, a copy of which marked "Exhibit A" is filed with the amended complaint therein; that in and by said trust agreement said trustee obligated itself to strict fidelity to these plaintiffs and to said trust estate, all to the end that the interests and welfare of said trust estate

should thereby be the better conserved and the said trust the more prudently managed and its affairs the more efficiently and advantageously administered; that the said obligations of said trustee and the faithful performances of such obligations were the consideration of said trust agreement and among the conditions precedent to the duty of these plaintiffs and of said trust estate to repay any moneys which said trustee might and should lay out and expend by virtue of its office as such trustee and in and about performing its duties to said trust estate and to these plaintiffs and other beneficiaries of said trust estate; but, plaintiffs say, the said moneys mentioned in this paragraph of reply were not laid out and expended by said trustee in the performance of its duties to said trust estate and to these plaintiffs and others as beneficiaries of said trust estate but on the contrary said trustee, in wrongful disregard of its said duties in the premises to said trust estate and in unlawful violation of the right of these plaintiffs and of said trust estate in the premises did, on, towit, the 28th day of October, 1912, wrongfully and unlawfully enter into a scheme and collusion with said Fidelity Trust Company in its corporate capacity proper to the purpose and intent the said trust company in its corporate capacity proper should to itself sequester and acquire as its own gain, advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that in and about the carrying out and accomplishing of said scheme and collusion said trustee agreed to and with said Fidelity Trust Company in its corporate capacity proper, that said trustee should abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the premises arising out of said trust agreement and, accordingly, said trustee did

abandon, disaffirm and repudiate said trust agreement and each and every duty and obligation of said trustee in the affected premises and thereupon said trustee joined with said Fidelity Trust Company in its corporate capacity proper in serving a written notice on these plaintiffs of such disaffirmance, abandonment and repudiation of said trust agreement and of the duties and obligation of said trustee thereunder; that a copy of said written notice of disaffirmance, abandonment and repudiation, marked "Exhibit A," is filed with the complaint herein; that thereupon said Trust Company in its corporate capacity proper wrongfully and unlawfully set about to sequester and acquire to itself and did accordingly acquire to itself as its own gain, advantage, profit and riches the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries; that while said Fidelity Trust Company in its corporate capacity proper was engaged in carrying out and accomplishing its said scheme and collusion and while it was engaged in and about sequestering and acquiring to itself as it did acquire to itself, as its own gain, advantage, profit, and riches the entire value and property of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries, the said Trust Company in its said corporate capacity proper laid out and expended each and every one of the sums of money, if in fact it laid out and expended any whatsoever, stated as to each and every of the said items mentioned in this paragraph of reply; that each and every of said sums of money so laid out and expended, if any, was laid out and expended by said trust company in its corporate capacity proper in aid and furtherance of its own wrong and said several items are not nor is either of them an item which arises out of the performance of said office of trustee

in the premises and each and every of said items should be disallowed wholly in this suit.

Wherefore, plaintiffs demand judgment as in their complaint prayed and they ask that each of the said items described in this paragraph of replies be wholly disallowed.

Printed Tr., pp. 192-5.

THE SUPPLEMENTAL COMPLAINT.

On October 23, 1917, plaintiffs filed their supplemental complaint in three paragraphs, in substance, as follows:

Paragraph 1. Dora E. Rooker and William V. Rooker, plaintiffs further complaining of grievances which have occurred to them since the filing of their original complaint herein, and for their first paragraph of supplemental complaint, say: "That plaintiffs now here reaffirm each and every allegation in their original complaint contained and in their amended complaint herein as of the several respective dates of said several respective pleadings; that since the bringing of this action and since the filing of the amended complaint herein, the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as trustee, wrongfully and unlawfully pursued each of the purposes and acts hereinafter more particularly set forth, and by such pursuit and acts have sought to consummate and make effective the wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, but at a particular time as to which these plaintiffs being without information, are unable to state, whereby said Trust Company in its corporate capacity proper was designing and intending to sequester, take over, appropriate and convert as its own gain, advantage and profit the entire property and value of said trust estate of the value, towit, $85,000 to the wrongful and unlawful ex-

clusion of these plaintiffs and all other just, lawful and proper beneficiaries of said trust estate; that in aid and advancement of said scheme and collusion, said Fidelity Trust Company in its corporate capacity proper, and with the knowledge, connivance and consent of said trustee, and with the unlawful and wrongful acquiescence, aid and assistance of said trustee, declared said trust agreement of date October 11, 1909, and the said several deeds executed concurrently therewith to be a mortgage, and to that effect and in furtherance of said scheme and collusion said Fidelity Trust Company in its corporate capacity proper did on, towit, the 24th day of March, 1913, wrongfully and unlawfully and maliciously and without probable cause therefor declare upon said trust agreement and said several deeds executed concurrently therewith as a mortgage executed by these plaintiffs to said Fidelity Trust Company in its corporate capacity proper, and in denial of said instruments as a deed of trust executed by these plaintiffs to said trust company as trustee; and so declaring said trust company in its corporate capacity proper, did on said date file in this cause the so-called cross complaint of said Fidelity Trust Company in its corporate capacity proper, whereby and wherein said cross-complainant asked that said trust agreement and said deeds be adjudged to be a mortgage executed by these plaintiffs to said Fidelity Trust Company in its corporate capacity proper, and in denial of said instruments as a trust deed executed by these plaintiffs to said trust company as trustee, and further asking that upon such adjudication of said instruments to be a mortgage that said mortgage be adjudged to have been defaulted by these plaintiffs and then and there subject to foreclosure as a mortgage, and that the same be foreclosed as mortgages are foreclosed, and that said premises therein described, the same being the said trust estate, be sold upon a certified copy of such

decree as other lands are sold on execution, and cross complainants further prayed judgment for its costs and for all other proper relief in the premises.

That thereafter such proceedings were had in said cause as that on, towit, the 5th day of November, 1913, said Fidelity Trust Company filed its amended cross complaint in this cause; that said amended cross complaint was both an amended and a supplemental cross complaint, and as a supplemental pleading it brought new matter into issue in this cause. That in said supplemental and amended cross complant, said trust company in its corporate capacity proper declared upon each of the following several items of payment, each as being outside of and beyond the terms of any trust agreement and particularly of the said trust agreement executed by and between these plaintiffs, and said Fidelity Trust Company as trustee, towit: (Here follows specification of items 1-23.)

That a bill of particulars was attached to and filed with said amended cross complaint purporting to show specifically each and every of the said items declared upon in said cross complaint as having been paid out by the said Fidelity Trust Company in its corporate capacity proper, and as constituting and comprising the consideration of the said mortgage to secure the said mortgage loan purporting to have been made by the said Fidelity Trust Company in its corporate capacity proper to said Dora E. Rooker and to said Dora E. Rooker and William V. Rooker on their respective lands in Hamilton county and in Marion county, all in the State of Indiana. That said bill of particulars included each of the items specified in the exhibits following, towit: (Here follows specifications of items.)

That upon said amended cross complaint said Fidelity Trust Company in its corporate capacity caused and required issue to be joined in this cause, and such proceedings thereafter to be had as resulted in judg-

ment and decree of this court adjudging said trust agreement and said deed executed concurrently therewith to be a mortgage, and adjudging said mortgage to be in default and adjudging that said mortgage be foreclosed, and in decreeing the foreclosure of said mortgage and in ordering and directing that said real estate described in said trust agreement and in the deeds executed concurrently therewith be sold upon certified copy of such decree as other lands are sold on execution; that thereafter said Fidelity Trust Company in its corporate capacity proper, caused and procured certified copies of said decree to be issued respectively to the sheriff of Marion county and to the sheriff of Hamilton county, and caused and procured said sheriffs respectively before advertising and selling said affected real estate in each of said counties to cause the same to be appraised; that said Fidelity Trust Company in its corporate capacity proper bid in said real estate at said respective sales and thereupon caused and procured said respective sheriffs to issue to said Fidelity Trust Company in its corporate capacity proper the sheriff's certificate of purchase of said respective tracts of land in said respective counties; that upon the expiration of the year for redemption of said sales said Fidelity Trust Company in its corporate capacity proper caused and procured said respective sheriffs to issue their several sheriff's deeds conveying said land so sold as aforesaid to said Fidelity Trust Company in its corporate capacity proper; that said proceedings throughout were prosecuted maliciously and without probable cause by said Fidelity Trust Company in its corporate capacity proper. That such prosecution of said action caused and required the said Dora E. Rooker and William V. Rooker to lay out and expend a large sum of money, towit, $15,000 in and about the defense of said action on said cross complaint; that said certifi-

cates of said sheriffs included the prosecution of and appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that in and by the opinion and judgment of said Supreme Court the judgment of the Hamilton Circuit Court in the affected premises was wholly reversed and set aside and held for naught, and said trust agreement was adjudged to be as it purports to be, a trust agreement and not a mortgage; that by reason of the said malicious prosecution of said action and without probable cause therefor the said Dora E. Rooker and William V. Rooker have been damaged as upon the facts stated in this paragraph of supplemental complaint, in the sum of $15,000, for which sum they demand judgment upon this paragraph of supplemental complaint.

Printed Tr., pp. 147-153.

Paragraph 2. Dora E. Rooker and William V. Rooker, plaintiffs, further complaining of grievances which have occurred to them since the filing of their original complaint herein, and for second paragraph of supplemental complaint say, that plaintiffs now here reaffirm each and every allegation in their original complaint and in their amended complaint herein as of the several respective dates of said several respective pleadings; that since the bringing of this action the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as trustee, have wrongfully and unlawfully pursued and by such pursuit have sought to consummate and make effective a wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, but at a particular time at which these plaintiffs being without information are unable to state whereby said trust company in its corporate capacity proper and for itself sequestered, took over, appropriated and converted as its own gain, advantage and profit the entire property and value of said trust estate to the wrong-

ful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries of said trust estate; that in aid and advancement of said scheme and collusion said Fidelity Trust Company in its corporate capacity proper, and with the knowledge and consent of said trustee and with the wrongful and unlawful acquiescence, aid and assistance of said trustee did declare said trust agreement of date October 11, 1909, and the said several deeds executed concurrently therewith to be a mortgage, and to that effect and in furtherance of said scheme and collusion they did confederate and conspire together to cause and procure said trust agreement to be adjudged in this action to be a mortgage, and as such mortgage to be foreclosed, and upon such foreclosure to order that said real estate described in said deeds of trust be sold as other lands are sold on execution; that in and by said proceedings said Fidelity Trust Company in its corporate capacity wrongfully and unlawfully obtained to itself the legal title in fee simple to said real estate; that while the said title to said real estate was in the said Fidelity Trust Company in its corporate capacity proper, said Fidelity Trust Company caused and committed waste to said real estate and wrongfully and unlawfully permitted waste to be committed on said real estate to such extent and manner as that a scale house, granary and crib building on said Marion county lands was wholly destroyed to the damage of said lands, $4,000; that the roof on the horse barn on said Marion county real estate was injured and impaired to such extent as to require a new roof to be placed thereon at a cost and expense of $500; that the buildings on said Marion county land were permitted to go without painting or other protection against the elements, to the injury of said buildings and said trust estate in the sum of $500; that 1,500 rods of fencing on said Marion county land were permitted to waste and be destroyed to the

damage of said real estate, $3,000; that on said Hamilton county lands 3,000 rods of fencing were permitted to waste and become destroyed to the damage of these plaintiffs and said trust estate in the sum of $6,000; that the barns and other buildings on said Hamilton county lands were permitted to waste and be injured by the elements to the damage of $3,000. That in all said trust estate was by reason of the said unlawful and wrongful conduct of the Fidelity Trust Company in its corporate capacity proper and of said Fidelity Trust Company as trustee conniving with and aiding and abetting its said co-defendant, wasted and damaged in the sum of $17,000.

Wherefore on this paragraph of complaint plaintiffs demand judgment in the further sum of $17,000.

Printed Tr., pp. 153-154.

Paragraph 3. Dora E. Rooker and William V. Rooker, plaintiffs, further complaining of grievances which have occurred to them since the filing of their original complaint herein, and for their third paragraph of supplemental complaint say, that plaintiffs now here reaffirm each and every allegation contained in their original complaint and in their amended complaint in this cause as of the several respective dates of said several respective pleadings. That after the execution of said trust agreement and said deeds which were executed concurrently therewith by and between these plaintiffs and said Fidelity Trust Company as trustee but at a particular time to these plaintiffs unknown, and for that reason they are here unable to give the date thereof, said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as trustee, wrongfully and unlawfully and with the purpose and intent that said Fidelity Trust Company in its corporate capacity proper might and should take over to itself as its own, made and entered into as between themselves a scheme and collusion to

destroy the credit and capacity of these plaintiffs to protect themselves in said trust estate against any unlawful act and purpose on the part of said defendants and to that purpose and effect and in carrying out said confederacy and conspiracy between them, said defendants agreed that said Fidelity Trust Company should not furnish the money with which to maintain said property and to carry on the business conducted thereon. That in furtherance of said conspiracy and confederacy said defendants did not nor did either of them furnish the necessary capital with which to maintain said farms and to operate them and to carry on the business conducted thereon; that said trust estate then and there consisted of a large acreage of agricultural lands, towit, 350 acres. That by reason of the said wrongful and unlawful acts of the defendants in withholding the capital necessary to operate said lands and in declining and refusing to carry out said trust agreement, said lands were permitted to go uncultivated and to be and remain idle to such extent as the earning value thereof was impaired and destroyed to the extent of an average of $10 per acre on each acre of said land, and for a period, towit, of seven years, and in the aggregate, towit, $24,500.00.

Wherefore, plaintiffs on this paragraph of supplemental complaint demand judgment in the sum of $24,500.00.

Printed Tr., pp. 154-5.

JOINT SUPPLEMENTAL SECOND AMENDED COUNTER CLAIM.

On the 29th day of May, 1918, the defendants filed their socalled joint supplemental second amended counter claim in two paragraphs. The first of these averred that since the filing of the second amended counter claim additional payments had been made, which were specified and for which judgment was

asked. The second paragraph was an attempted retraction of the act of repudiation of the trust agreement and brought into the record in the case what may be called the Ewbank judgment of the Marion Circuit Court. This paragraph was in substance to the effect following:

"For second and further paragraph by way of counter claim, defendant says that while the plaintiffs herein, since the commencement of their original action and since the filing of the last counter claim of this defendant herein have contended before this court, that the deeds of conveyance and the memorandum of trust executed contemporaneously therewith constitute a trust estate and vest the title to the lands in the defendant Fidelity Trust Company as trustee, with the power vested in this defendant as trustee, to sell the same according to the provisions of the trust, and have complained because the lands were not sold, yet notwithstanding that fact they have ever since the filing of the defendant's second amended counter claim outside of the court, openly claimed and asserted a proprietory interest in said lands and asserted title thereto and denied this defendant's right, as trustee, to sell and convey the same pursuant to and for the purposes enumerated in said memorandum of trust; * * * that said plaintiffs after the rendition of judgment in this court on the original complaint and cross-complaint of the parties, namely, on May 26, 1916, filed against this defendant in the Marion County Circuit Court their complaint in statutory form to quiet the title in them to said Marion county lands; that on June 4, 1916, they filed a second paragraph of complaint in said cause, followed by other pleadings on the part of both parties; that after said original cause referred to was reversed in the Supreme Court, said plaintiffs still pursued and pressed said action in the Marion County Circuit Court to quiet their title, whereupon this de-

fendant on June 23, 1917, filed its cross complaint, setting up the title, as trustee, to said Marion county lands under the deed of trust and memorandum of trust set forth in the pleadings in this cause, and praying for an injunction enjoining the plaintiffs in said action, Dora E. Rooker and William V. Rooker, from denying or disputing this defendant's title, as trustee, to said lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee under and pursuant to its power of sale; that afterward, on October 4, 1917, said cause was submitted to the Marion County Circuit Court for trial finding and judgment, and a special finding of facts and conclusions of law having been requested by the plaintiffs in this action, the court on December 4, 1917, filed its special findings and conclusions of law, and thereafter on February 5, 1918, entered judgment upon the special findings and conclusions of law, by which judgment said court adjudged the sheriff's sale of said Marion county real estate made under the decree of foreclosure rendered on the original judgment in this cause null and void and of no effect, and further adjudged that this defendant, Fidelity Trust Company, as trustee, under and pursuant to the deed of trust referred to, as such trustee, is the owner in fee simple, as trustee, of said Marion county lands, with full power to sell and convey the same in accordance with the provisions of said deed of trust by which it was conveyed to this defendant, as trustee, by the plaintiffs herein, and that all claims of the plaintiffs in said action were unfounded, and that the title thereto of this defendant, Fidelity Trust Company, as trustee, under said deed of trust be quieted and forever set at rest, and that the plaintiffs, Dora E. Rooker and William V. Rooker, be perpetually enjoined from denying or disputing the title of said Fidelity Trust Company, as trustee, to said lands, and from denying, disputing, obstructing or

interfering with the sale of said lands by said trustee, under and pursuant to its power of sale; that after the rendition of said judgment and the granting of said injunction, the plaintiffs prayed an appeal to the Supreme Court, and sixty days' time was given to file bills of exceptions, and the appeal prayed for granted upon filing bond in the sum of $5,000.00; that no bill of exceptions or bond was filed in said cause, but on May 15, 1918, the plaintiffs, Dora E. Rooker and William V. Rooker, ordered a transcript for appeal to the Supreme Court, all for the purpose of hindering and obstructing the sale of said Marion county lands by this defendant pursuant to and under the provisions of the trust created by the plaintiffs.

"And this defendant now further shows to the court that it has given notices of the sale of said Marion county lands pursuant to the provisions of and in accordance with the terms of said agreement of trust referred to, by serving a ninety day notice in writing upon the plaintiffs, Dora E. Rooker and William V. Rooker, and then publicly advertising said Marion county lands for sale in the Indianapolis News and Indianapolis Star, four weeks successively, once a week; that while several inquiries were made by prospective purchasers, this defendant was unable to secure the purchaser on account of widespread rumors afloat in the community that this defendant, as trustee, would be unable to give peaceful possession to a purchaser of said lands, which rumors to that effect are the result of the conduct of the plaintiffs herein; that the plaintiffs still retain possession of all said lands and enjoy the profits thereof, without paying any obligations, charges or even taxes, and that said Marion county lands are incumbered with a mortgage given to secure a loan of $6,000.00 made by the plaintiffs herein prior to the conveyance of said lands to this defendant, as trustee, and that said mortgage, with several years'

interest thereon, remains unpaid, and that said Marion county lands will not sell by far for enough to pay off said mortgage and the moneys advanced by this defendant, and that it will be necessary to sell both the Marion county and the Hamilton county lands in order to pay and discharge the amounts advanced as hereinbefore shown; that the plaintiffs herein are in like manner also claiming an interest in said Hamilton county lands and are asserting and attempting to assert and claim title to the same, which said interest so claimed by plaintiffs herein is adverse to this defendant's claim and title to said real estate as trustee, under and pursuant to the deed of trust and memorandum of trust executed by the plaintiffs, and that the claim of said plaintiffs is unfounded and without right, and is a cloud upon this defendant's title, as trustee, to said real estate, and that this defendant, as trustee, is the owner of and entitled to have its title as trustee quieted and forever set at rest in and to said lands situate in Hamilton county, Indiana, and described as follows: [Here follows description by metes and bounds of 275 acres of land, being the Hamilton county real estate described in the trust deed of October 11, 1909.]

"And this defendant further shows the court that the plaintiffs herein will interfere with, hinder and obstruct any attempted sale of said Hamilton county lands by this defendant, as trustee, although such sale be attempted to be made under and pursuant to the powers and in strict compliance with the provisions contained in said deed of trust and memorandum of trust, and that unless they be enjoined from interfering with, hindering and obstructing such sale, this defendant, as trustee, will be powerless to exercise and discharge the power of sale conferred upon it as such trustee. In consideration thereof, this defendant says that the sales of the lands under and in pursuance of

the powers and in compliance with the provisions of said trust, should be made by this defendant, as trustee, under the order and guidance of this court, and that without said aid and assistance of the court by reason of the plaintiffs' action as aforesaid, no advantageous sales can be made, and further that if a sale is made the plaintiffs will refuse to give possession of the lands unless this court by its order grants its assistance.

"Wherefore this defendant prays the court that its title in and to said Hamilton county lands may be forever quieted and that upon judgment being rendered herein the court also enjoin the plaintiffs from denying or disputing the title of this defendant, as trustee, to said Hamilton county lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee under and pursuant to its power of sale containued in the deed and memorandum of trust executed by the plaintiffs herein to this defendant as such trustee, and that the court enter its order and decree directing the sale of said Marion County and Hamilton county lands, and for all other appropriate equitable relief as to the court may seem just and necessary." [Here followed specifications of vouchers paid.]

Printed Tr., pp. 166-173.

DEMURRERS TO SUPPLEMENTAL SECOND AMENDED COUNTER CLAIM.

Demurrers were filed by plaintiffs to each paragraph of the second amended counter claim as supplemented, for want of facts sufficient to constitute a cause of action in favor of the defendents and connected with the cause of action in suit herein and with their demurrer plaintiffs filed a memorandum of points as required by the Indiana practice act. The substance of the demurrer and points was as follows:

"Plaintiffs demur to each paragraph of second

amended counter claim as supplemented for the reason the same does not state facts sufficient to constitute a cause of action connected with the cause of action in suit herein. For their memorandum plaintiffs under these points viz:

"1. The second amended counter claim as supplemented is joint as to the plaintiffs (defendants) and must be good as to both or bad as to both.

"There is no privity of contract as between the plaintiffs and either of the defendants except the defendant as trustee.

"It contravenes the mandate of the Supreme Court in this cause to admit issues in this cause which are outside of those within the terms and effect of the trust agreement and the notice of repudiation thereof and the suit for an accounting as between the plaintiffs and the trustee. If the trustee borrowed money from Fidelity Trust Company, or any other bank or banker whomsoever such transaction would not under the trust agreement, constitute or create a privity between such bank or banker and these plaintiffs.

"2. Steps taken by the Fidelity Trust Company in its corporate capacity proper to fortify the title it sought to acquire and did acquire unlawfully were acts done in aid of its own wrong and have no place in an accounting between the *cestuis que trustents* and the trustee.

"3. The trustee and its co-plaintiff having elected to repudiate the trust agreement and having thereby caused the *cestuis que trustents* to change their situation greatly to their loss and damage will not be heard to declare that such act of repudiation was void and that such election to repudiate is to be disregarded.

"The trustee having elected, with the aid and participation of its co-plaintiff to repudiate the trust and having thereafter caused the plaintiffs to suffer loss and damage and to change their situation could not in

any court ask that said trust agreement be reinstated except upon a tender that equity be done these plaintiffs. There is no tender of equity made."

The demurrer was overruled and exception.

Printed Tr., pp. 195-6.

Issues were joined with answer of general denial and payment as to the joint second supplemental amended counter claim and with reply of general denial to the special answer.

SUBMISSION AND TRIAL RECORD.

Upon the record so made as to issues, the Circuit Court departed wholly from the mandate of the Supreme Court, and the errors upon the issues were carried into the rulings on upon evidence at the trial of the cause. Many of these rulings at the trial were repetitions. They will be presented with an illustrative ruling in that part of this brief which states the various Federal questions. These errors at the trial are shown in a bill of exceptions.

Printed Tr., pp. 227-452.

SPECIAL FINDINGS AND CONCLUSIONS OF LAW.

The court made a special finding of facts, stated conclusions of law thereon and rendered judgment accordingly. This method of procedure is statutory in Indiana.

The special findings and conclusions of law of the Circuit Court are stated *in extenso* in the second opinion of the Supreme Court and therefore are not separately recited here.

Printed Tr., pp. 455-469.

MOTION FOR JUDGMENT ON SPECIAL FINDINGS.

On December 21, 1918, and when the special findings came in, the plaintiffs each respectively moved the

court for judgment in their favor on the special findings of facts. Overruled and exceptions.

Printed Tr., p. 214.

EXCEPTIONS TO CONCLUSIONS OF LAW.

On December 21, 1918, when the conclusions of law were stated, the plaintiffs each separately and severally excepted to each conclusion of law. There never was any ruling on these exceptions, other than that they were disregarded by the court.

Printed Tr., p. 214.

SECOND JUDGMENT OF CIRCUIT COURT.

On December 21, 1918, the Circuit Court rendered its second judgment herein, which in substance was as follows, to-wit:

"Come now the parties and the court having found the facts specially and stated its conclusions of law thereon, now renders judgment accordingly.

"It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the disposition of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

"It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant Fidelity Trust Company had not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making

distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same which lands are described as follows: [Here follows a description of the 355 acres of land comprising the trust estate, there being 275 acres in Hamilton county and 80 acres in Marion county.]

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, trustee, is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of fifty thousand six hundred ninety seven ($50,697.00) dollars.

"It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deed of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof, and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee, is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both,

hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as such trustee proceed under the power and according to the terms of said deeds and trust agreement and made and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion county lands having failed to sell for the sum of eighteen thousand ($18,000.00) dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion county lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion county lands do not sell for lack of a bid, then said trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton county lands for whatever sum they will bring over and above the upset price of sixty-five thousand ($65,000.00) dollars; that if said Hamilton county lands do not sell for said

sum of sixty-five thousand ($65,000.00) dollars, for lack of a bid for that sum, then said trustee, after ninety (90) days' notice in writing to the plaintiffs of their intention to so do, shall sell said Marion county lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion county lands under this decree they do not fetch enough to pay the moneys and perform the obligations against said trust estate, in this action found to exist and to be due, then said trustee shall after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton county lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

"It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

"1. To the payment of the costs of this action.

"2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

"3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of fifty thousand six hundred ninety-seven ($50,697) dollars.

"4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

"5. The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrator and assigns."

Printed Tr., pp. 216-7.

MOTION TO MODIFY THE JUDGMENT.

On January 2, 1919, the plaintiffs filed their respective motions to modify the judgment, said motions being in substance as follows, to-wit:

"Particular No. 1. To strike out from the entry of said judgment the following words: 'It is, therefore, considered adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of lands, comprising the trust estate hereinafter described,' and for cause plaintiffs say that so much of said ruling as above quoted contravenes the law of the case as decided by the Supreme Court on the former appeal.

"Particular No. 2. To strike out and suppress from said entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that the defendants and cross-complainant Fidelity Trust Company, has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 3. To strike out and suppress from said entry of judgment the following words, to-wit: 'By taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of com-

pleting its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement, and not otherwise, and in no other capacity,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 4. To strike out and suppress from entry of judgment the following words, to-wit: 'That said defendant and cross-complainant Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands by warranty of the fee simple title, and give full possession of the same,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 5. To strike and suppress from entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sale of the lands so held in trust by it, as hereinbefore provided, in the sum of fifty thousand, six hundred and ninety-seven dollars,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of this case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 6. To strike out and suppress from entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by their said deeds of conveyance and trust agreement

have parted with all their title to said real estate and appurtenances thereunto belonging and the right to the possession thereof and the use and rents and profits thereof and have no interest other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee and said Dora E. Rooker and William V. Rooker, be and they are, each and both, hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession, use, rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands as aforesaid,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case, and the plaintiffs would further show unto the court that said trust was not at any time a trust of, or representing a trust of investment or of income, but said trust was solely a trust affecting the principal of said trust estate, and said trustee was to have been active only in making the trust sale in the matter of converting said trust estate into cash and in the maintenance of said trust pending

the sale and the distribution of the proceeds of said trust estate and was not at any time a trust affecting the possession, rents and profits thereof prior to such sale.

"Particular No. 7. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put purchaser or purchasers thereof in possession; that said Marion county lands having failed to sell for the sum of eighteen thousand dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion county lands above described forthwith for whatever sum they may bring, using diligence to procure the highest and best bid obtainable therefor; that if said Marion county lands do not sell for lack of a bid, then said trustee shall, after giving plaintiffs said ninety days' notice in writing of their intention so to do, sell and convey said Hamilton county lands for whatever sum they will bring over and above the upset price of sixty-five thousand dollars; that if said Hamilton county lands do not sell for said sum of sixty-five thousand dollars for lack of a bid for that sum, then said trustee, after ninety days' notice in writing to plaintiffs of their intention so to do, shall sell said Marion county lands at public auction, for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefore; that if upon any sale of the Marion county lands under this decree they do not

fetch enough to pay the moneys and perform the obligations against said trust estate in this action found to exist and to be due, then said trustee shall, after giving thirty days' notice to said plaintiffs of their intention so to do, proceed to sell and sell and convey said Hamilton county lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefore; that any sale or sales made under this decree shall be forthwith submitted to this Court for approval or disapproval,' that for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 8. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sale or sales as follows: (1) To the payment of the costs of this action; (2) to the payment of any mortgage or other lien, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, trustee; (3) to the payment to said Fidelity Trust Company of the payment on account herein decreed in the sum of fifty thousand six hundred ninety-seven dollars; (4) to the reimbursement of said Fidelity Trust Company of any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree; (5) the rest and residue of any money derived from said sale or sales shall be paid to said Dora E. Rooker, her heirs, executors, administrators and assigns,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the

case as adjudged by the Supreme Court on the former appeal in this case."

The motions to modify the judgment were overruled and the plaintiffs excepted.

Printed Tr., pp. 217-9.

THE MOTIONS FOR NEW TRIAL.

The plaintiffs filed their motions for a new trial, which in substance were to the effect following:

1. That each the sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth and twentieth special findings of facts, separately and severally considered, is not sustained by sufficient evidence.

Printed Tr., pp. 206-214.

2. That each the sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth and twentieth special findings of facts separately and severally considered, is contrary to law.

Printed Tr., pp. 206-214.

3. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz.: "And whether or not the Fidelity Trust Company paid to the party in whose favor that voucher is drawn the amount of money therein specified, namely, sixty dollars," and in admitting in evidence the answer thereto.

Printed Tr., p. 306.

4. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 3 in favor of George Keyser in the sum of four hundred dollars, and in admitting said exhibit in evidence.

Printed Tr., pp. 342-7.

5. The court erred at the trial of the cause in overruling the plaintiffs' motions to strike from their coun-

ter claims and answer the name of the Fidelity Trust Company in its corporate capacity proper; and we ask that that motion be extended to include all pleadings in which the Fidelity Trust Company as trustee and the Fidelity Trust Company in its corporate capacity proper appear to be jointly litigating their particular rights.

Printed Tr., p. 343.

6. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 4 and in admitting said exhibit in evidence.

Printed Tr., pp. 347-8.

7. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 5 and in admitting said exhibit in evidence.

Printed Tr., pp. 350-1.

8. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 6 and in admitting said exhibit in evidence.

Printed Tr., pp. 352-3.

9. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 7 and in admitting said exhibit in evidence.

Printed Tr., pp. 354-6.

10. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz.: "I will ask you the further question, whether or not this check was in payment of the judgments on mechanics' lien taken against Mrs. Rooker's property in Hamilton county," and in admitting in evidence the answer thereto.

Printed Tr., p. 356.

11. The court erred at the trial of the cause in over-

ruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 8 and in admitting said exhibit in evidence.

Printed Tr., p. 356.

12. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz.: "Here is fifty-six for accumulation of interest on same loan," and in admitting in evidence the answer thereto.

Printed Tr., p. 360.

13. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 11 and in admitting said exhibit in evidence.

Printed Tr., p. 364.

14. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 16 and in admitting said exhibit in evidence.

Printed Tr., pp. 370-1.

15. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 19 and in admitting said exhibit in evidence.

Printed Tr., pp. 375-8.

16. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 20 and in admitting said exhibit in evidence.

Printed Tr., pp. 379-80.

17. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendant's Exhibit No. 28 and in admitting said exhibit in evidence.

Printed Tr., pp. 392-3.

18. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in

evidence of defendants' Exhibit No. 32 and in admitting said exhibit in evidence.

Printed Tr., pp. 397-9.

19. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 33 and in admitting said exhibit in evidence.

Printed Tr., pp. 399-400.

20. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 34 and in admitting said exhibit in evidence.

Printed Tr., pp. 401-2.

21. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 37 and in admitting said exhibit in evidence.

Printed Tr., pp. 405-6.

22. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 49 and in admitting said exhibit in evidence.

Printed Tr., pp. 418-9.

23. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz.: "You may state whether or not the Fidelity Trust Company as trustee in this estate, trustee of the estate, had any funds which belonged to the trust," and in admitting in evidence the answer thereto.

Printed Tr., p. 423.

24. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 52 and in admitting said exhibit in evidence.

Printed Tr., pp. 424-5.

25. The court erred at the trial of the cause in over-

ruling the plaintiffs' objections to the following question put to William M. Fogarty, viz.: "Now, you may state whether pursuant to that notice, you are able to make sale of the Marion county land," and in admitting in evidence the answer thereto.

Printed Tr., p. 425.

26. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz.: "You may state whether or not they ever turned in to you any of the proceeds of the land," and in admitting in evidence the answer thereto.

Printed Tr., p. 426.

27. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to William M. Fogarty, viz.: "What did he say as to that," and in admitting in evidence the answer thereto.

Printed Tr., p. 426.

28. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following questions put to William M. Fogarty, viz.: "You may state whether or not Rooker in open court, there claimed on behalf of himself and his wife, the plaintiffs in that action, to be the owners of the property and asked and insisted upon the court quieting title in them," and in admitting in evidence the answer thereto.

Printed Tr., p. 429.

29. The court erred at the trial of the cause in overruling the plaintiffs' motion to strike out the following answer given by William M. Fogarty, viz.: "That the title should be quieted by that proceeding in himself and his wife, Dora E. Rooker."

Printed Tr., p. 429.

30. The court erred at the trial of the cause in overruling the plaintiffs' objections to the following question put to Henry Seyfried, viz.: "I will ask you to

state whether your intervention in that case was for the purpose of sustaining the American Central Life Insurance mortgage," and in admitting in evidence the answer thereto.

Printed Tr., p. 444.

31. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 54 and in admitting said exhibit in evidence.

Printed Tr., pp. 449-50.

32. The court erred at the trial of the cause in overruling the plaintiffs' objections to the introduction in evidence of defendants' Exhibit No. 55 and in admitting said exhibit in evidence.

33. That there is error in the assessment of defendants' damages, the same being too large.

34. That there is error in the assessment of plaintiffs' damages, the same being too small.

Printed Tr., pp. 221-4.

ASSIGNMENTS OF ERROR IN THE STATE COURT.

Assignments of error in the State Court were variously made. They included separate assignments and joint assignments by the appellants, and were respectively directed against the appellees severally, and against the appellees jointly. They embodied the kindred rulings and exceptions. We exhibit herewith the substance of one of them, to-wit:

Dora E. Rooker and William V. Rooker, appellants, who were plaintiffs in the court below, for their joint assignment of errors herein against the above-named appellees jointly, who were defendants in the court below, say that there is manifest error in the record, proceedings and judgment of the Hamilton Circuit Court of Indiana, being the court below from which this appeal is prosecuted, in each of the following several particulars, that is to say:

1. The court erred in overruling the plaintiffs' motions to strike out the second amended counter claim of the defendants, to which ruling of the court the plaintiffs at the time excepted.

Printed Tr., pp. 141-3.

2. The court erred in overruling the plaintiffs' demurrers to the second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

Printed Tr., pp. 143-5, pp. 161-4.

3. The court erred in overruling the plaintiffs' motion to make more certain and specific the second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

Printed Tr., pp. 145-7.

4. The court erred in overruling the plaintiffs' demurrers to the supplemental second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

Printed Tr., pp. 159-6.

5. The court erred in overruling the motion of the plaintiffs for judgment on the special findings of facts, to which ruling of the court the plaintiffs at the time excepted.

Printed Tr., p. 214.

6. The court erred in each of the following numbered conclusions of law, to each of which conclusions of law severally and separately considered the plaintiffs at the time excepted, namely, the first, the second, the third, the fourth, the fifth and the sixth conclusions of law.

Printed Tr., p. 214.

7. The court erred in overruling the plaintiffs' motions to modify the judgment, to which ruling of the court the plaintiffs at the time excepted.

Printed Tr., pp. 217-9.

8. The court erred in overruling the plaintiffs' mo-

tions for new trial, to which ruling of the court the plaintiffs at the time excepted.

Printed Tr., pp. 221-4.

Wherefore the appellants, who were plaintiffs in said cause in said court below, pray that the judgment of said Hamilton Circuit Court of Indiana, given and rendered in said cause, be in all things reversed and appellants pray for all proper relief.

Printed Tr., pp. 4-8.

SECOND OPINION OF THE SUPREME COURT.

On June 22, 1921, the Supreme Court of Indiana rendered its second opinion in this cause in substance, to-wit:

"Willoughby, J.—This case is a resumption of proceedings under the mandate of this court in Rooker vs. Fidelity Trust Company, 185 Ind. 172. The appellants as settlers of a trust in lands sued appellee, who was the trustee alleging a violation and repudiation of the trust and demanding damages, an accounting, that the appellee trustee be removed, and that a receiver be appointed for the trust estate to administer it under the terms of the trust agreement. Appellee on its part filed a cross-complaint in which it set up the same trust and its duties under it as trustee, its performance of all its duties save the sale of the trust estate, its reason for not making such sale, its purpose to carry out the sale and its hindrance by appellants' interference and claim of title. It asked an accounting that its title as trustee be quieted, that appellants be enjoined and that it be decreed to make sale pursuant to the trust agreement and distribution of proceeds accordingly.

"Appellants' complaint was answered by appellee trustee by general denial. Issue was formed on the cross-complaint of appellee trust company by answer of general denial and by special partial answers, the issues on the latter being made by replies in general

denial. On these issues the cause was submitted to the court for trial, and the following special finding of facts and conclusions of law were made and stated by the court.

"The court finds the facts to be: First, that on and prior to the 11th day of October, 1909, the plaintiff, Dora E. Rooker, was the owner in fee simple of certain real estate situate in Hamilton county, Indiana. Second, that on and prior to the 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entireties, of certain real estate situated in Marion County, Indiana. Third, that on the said 11th day of October, 1909, said plaintiff, Dora E. Rooker and William V. Rooker, her husband, executed and delivered to said cross-complainant, Fidelity Trust Company as trustee, their warranty deed for the lands in Hamilton county.

"To have and to hold, said real estate, however in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of liens by reason of improvements made on the above described real estate.

"Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising

from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee.

"And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances.

"And to do any and all acts and to execute any and all papers, which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

"And in the event any such liens or charge against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforceable by it and collectible with interest at the rate of 6% per annum, to be credited semi-annually as a debit and charge against said real estate.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of certain principal note of said grantor in the sum of Fourteen Thousand ($14,000) Dollars together with interest thereon and recorded in mortgage record 52, page 84, in the office of the Recorder of Hamilton County, Indiana.

"That said Indenture by Dora E. Rooker and William V. Rooker, her husband, was received for record on the 14th day of October, 1909, and recorded in record 97, at page 117, in the Recorder's office of Hamilton County, Indiana.

"Fourth. That on said 11th day of October, 1909,

the plaintiff William V. Rooker and Dora E. Rooker, husband and wife, executed and delivered to said cross-complainant Fidelity Trust Company as trustee, their warranty deed for the lands in Marion County.

"To have and to hold said real estate, however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee, as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell the same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said Fidelity Trust Company is directed to apply the proceeds, arising from such sale in the manner and for the purpose set out in the contract entered into between said gran-

tors and said Fidelity Trust Company, trustee, on this date.

"The said Fidelity Trust Company of Indianapolis, as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of 6% per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

"This conveyance is made subject to the taxes for the year 1908 and 1909 and subject also to certain mortgage executed March 12, 1909, by the grantors, William V. Rooker, and Dora E. Rooker husband and wife, to the Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of six thousand ($6,000) dollars and interest coupon notes thereon which mortgage is recorded in mortgage record 523, page 128, in the office of the Recorder of Marion County, State of Indiana.

"That this Indenture was received for record on the 14th day of October, 1909, and recorded in Record 52, page 101 in the office of the Recorder of Marion County, Indiana.

"Fifth. That contemporaneously with the execution of the two warranty deeds executed on the 11th day of October, 1909, to said Fidelity Trust Company, Trustee, and as part of the same transaction the plaintiffs Dora E. Rooker and William V. Rooker, as first parties and the defendant and cross-complainant, Fidelity Trust Company of Indianapolis, Indiana, as second party, executed in duplicate on the 11th day of October, 1909, a memorandum or contract in writing. (This memorandum or contract in writing is set out in full in the opinion in Rooker vs. Fidelity Trust Company, 185 Ind. beginning page 173).

"Sixth. That since the execution of said warranty deeds and said written memorandum, the plaintiff, Dora E. Rooker, has continued in the possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the plaintiffs, William V. Rooker and Dora E. Rooker, have continued in the possession of and farmed all of the real estate situated in Marion County, Indiana, and are now in possession thereof.

"Seventh. That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff, Dora E. Rooker, has received all of the proceeds arising out of the Hamilton County real estate and has not at any time rendered an accounting to the Fidelity Trust Company, Trustee, and the plaintiffs William V. Rooker and Dora E. Rooker have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company, Trustee.

"Eighth. That Fidelity Trust Company, Trustee, has not sold or conveyed any of the real estate conveyed to it by plaintiffs and that the title of the same is now in the said Fidelity Trust Company, Trustee, and that said Fidelity Trust Company is not claiming

or asserting any other title than the title and right set forth in the deeds of conveyance and memorandum of trust, hereinbefore set out in these findings.

"Ninth. That prior to the commencement of plaintiffs' action namely on or about the 15th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company, Trustee, served a written notice upon the plaintiffs demanding the payment of certain sum aggregating Nineteen Thousand Six Hundred Dollars and Four ($19,604.04) Cents and tendered for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County lands to the original grantors upon the payment of the aforesaid sum upon demand and stating that said quit claim deed will remain in the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the demand.

"Tenth. That the plaintiff, Dora E. Rooker, in the constructing of her dwelling house on the Hamilton County land contracted large liabilities to various persons, firms and corporations for work and labor done and material furnished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said Fidelity Trust Company, Trustee, under said contract and upon the security evidenced by said two separate warranty deeds and agreement of trust, all executed and delivered October 11, 1909, did from time to time thereafter upon the written order and direction of the plaintiff, Dora E. Rooker, first pay out the total sum of Six Thousand ($6,000.00) Dollars and did further, after paying on the written order and direction of said Dora E. Rooker the total sum of Six Thousand Dollars let out and expend a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the

plaintiff Dora E. Rooker issued from time to time to the defendant and cross-complainant, Fidelity Trust Company, directing the payment of certain obligations showing on their face the nature of the claim, the amount thereof, and the party to whom payment should be made, and that the signature affixed thereon is the signature of the plaintiff, Dora E. Rooker.

"Eleventh. That said Fidelity Trust Company made payment on such written orders issued from time to time by plaintiff, Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff, Dora E. Rooker, and receipted by the respective parties in whose favor the voucher is drawn aggregating the sum of $15,813.21.

"Twelfth. The said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts aggregating the sum of $21,194.27.

"Thirteenth. That no assets came into the possion of the Trustee other than lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Indiana, a corporation engaged in the business of operating a trust company under the laws of the state of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

"Fourteenth. That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, Trustee, is entitled to have and receive for its compensation, a trustee's fee of one hundred and fifty ($150.00) dollars, which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of two (2) per cent. on loans and advancements and all moneys laid out and expended, of which One Hundred and Twenty ($120)

Dollars has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant is further entitled to have and receive interest on all moneys loaned or advanced at the rate of six (6) per cent. per annum.

"Fifteenth. That the plaintiffs are entitled to the following credits, to-wit: Ninety-five ($95.00) Dollars, together with interest thereon at six (6) per cent. from October 16, 1909, on account of the cancellation of insurance policy of Six Thousand ($6,000) Dollars, said sum having been charged against plaintiffs under the order and voucher dated October 16, 1909; also a credit of Five Hundred ($500) Dollars with interest at four (4) per cent. from August 26, 1910, less Fifteen ($15) Dollars deducted from the principal amount as a premium upon the Surety Company bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company as collateral on a supersedeas in the case of William V. Rooker and Dora E. Rooker vs. Ludowici Caladon Company in the appellate court, which cause was affirmed on appeal and upon the judgment being paid said security of deposit returned; also a rebate of Four Hundred and Two and 81/100 Dollars ($402.81) representing the various amounts of penalties and costs including in various payments for taxes on the Marion County Lands.

"Sixteenth. There is now due and owing to the defendant and cross-complainant herein from the plaintiffs cross-defendants herein, the principal sum of Thirty-seven Thousand and Seven and 48/100 ($37,007.48) Dollars; and for the interest thereon, the aggregate sum of Fourteen Thousand Two Hundred and Seventy-one and 29/100 ($14,271.29) Dollars; and for commission at two (2) per cent. on all funds paid out in excess of Six Thousand ($6,000) Dollars the aggregate sum of Six Hundred and Twenty and 14/100 ($620.14) Dollars from which there shall be deducted

the aggregate sum of Nine Hundred Eighty-two and 81/100 ($982.81) Dollars, together with interest thereon amounting to Two Hundred and Eighteen and 51/100 ($218.51) Dollars, being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein in the sum of Fifty Thousand Six Hundred and Ninety-seven and 59/100 ($50,697.59) Dollars.

"Seventeenth. That all the amounts advanced and paid out by the defendant Fidelity Trust Company, Trustee, as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker, and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, Trustee, is entitled to reimburse itself therefor according to the terms of said trust agreement by the sale of said lands therein provided.

"Eighteenth. That on the 21st day of June, 1917, the defendant Fidelity Trust Company, as Trustee, served a notice upon William V. Rooker and Dora E. Rooker of which the following is a copy:

"To William V. Rooker and Dora E. Rooker:

"Pursuant to the provisions of the deed of conveyance executed to the undersigned as Trustee, on the 11th day of October, 1909, conveying to the undersigned as Trustee, the following described real estate in Marion County, State of Indiana, to-wit: The southeast quarter of the northeast quarter of section 33, Township 17 north, range 4 east, containing 40 acres more or less; also the southwest quarter of the northwest quarter of section 34, Township 17 north, range 4 east, containing 40 acres, more or less, and the memorandum executed concurrently therewith, notice

is hereby given that the Fidelity Trust Company as Trustee will ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the purchaser. Dated at Indianapolis, Indiana, this 21st day of June, 1917.

"Fidelity Trust Company, Trustee,
By W. M. Fogarty, President.

"Attest
"James G. Flaherty, Secretary."

"Nineteenth. That after the execution of said deeds of conveyance and written memorandum set forth in paragraph of this finding designated third, fourth and fifth, and prior to the demand for repayment and tender of deed for reconveyance set forth in the ninth paragraph of this finding, the plaintiff, William V. Rooker acting for himself and his wife, and co-plaintiff, Dora E. Rooker, did on several occasions express and convey to defendant, the Fidelity Trust Company, their intentions to pay off the advancements, more specifically set forth in this finding, theretofore made by it under said deeds and memorandum and take reconveyance of said land and otherwise by their course and conduct did induce said demand for repayment and tender of re-conveyance.

"Twentieth. That said Fidelity Trust Company, Trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said Trust agreement, hereinbefore set out, but that said Marion County lands were not sold within one year after the execution of said memorandum and deeds, and have not yet been sold by said trustee under said trust provisions; that ninety (90) days notice in

writing was given, as set forth in the previous findings, notifying the plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that the plaintiffs have been, were then and are now asserting an interest in said lands adverse to the rights of said Trust Company, as Trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands, adverse to the right of the said Trust Company, as Trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above.

"That the plaintiffs, in open court, have disputed and now deny the right of the said Trust Company as Trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and now are resisting the sale of said lands or any of them by said Trustee, and are now prosecuting an appeal in the appellate court from a judgment of the Marion Circuit Court, quieting the title of the Marion County lands in said Fidelity Trust Company as Trustee, and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as Trustee to said Marion County lands and from denying, disputing, obstructing or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust.

"That the assertion of interest in said lands by plaintiffs as herein above stated adverse to the interest of Fidelity Trust Company as Trustee, under said trust agreement is unfounded and without right. Upon the foregoing facts the court states the following conclusions of law:

"1. The law is with the defendant on the issues joined on plaintiffs' complaint.

"2. The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

"3. The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant, Fidelity Trust Company, Trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

"4. The defendant and cross-complainant, Fidelity Trust Company, is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

"5. The defendant and cross-complainant is entitled to judgment on account in the sum of $50,697.00 to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

"6. The defendant and cross-complainant is entitled to recover its costs in this action taxed at $-———

"The court having found the facts specially and stated its conclusion of law thereon, now renders judgment accordingly.

It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

"It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its

duties as trustee, under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant, Fidelity Trust Company, as such Trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen, (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

"Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

"Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

"Also that part of the northeast quarter of section thirteen (13) township, eighteen (18) north, range four (4) east more particularly described as follows:

Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods more or less, to White River thence southerly along said stream with the meanderings thereof to be a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

"And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres more or less situated in Marion County, Indiana.

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, Trustee, is entitled to judgment on this account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

"It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker, and William V. Rooker, by said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker, under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in

the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as Trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

"It is further considered, ordered adjudged and decreed that said Fidelity Trust Company as such Trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand ($18,000) Dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion county lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then

said Trustee shall, after giving said plaintiffs ninety (90) days notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-five Thousand ($65,000) Dollars; that if said Hamilton County lands do not sell for said sum of Sixty-five Thousand ($65,000 Dollars, for lack of a bid for that sum, then said trustee, after ninety (90) days notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands, under this decree they do not fetch enough to pay the moneys and perform the obligation against said trust estate, in this action found to exist and to be due, then said trustee shall after giving thirty (30) days notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

"It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

"1. To the payment of the costs of this action.

"2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

"3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in

the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

"4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

"5. The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

"From this judgment and decree appellants appeal and allege errors relied on for reversal as follows:

"1. In overruling motions to strike out the appellee's second amended counter-claim.

"2. In overruling the demurrers to the second amended counter-claim for insufficiency of facts.

"3. In overruling motion to make second amended counter-claim more specific.

"4. In overruling appellants' motion for judgment on the special findings.

"5. The trial Court erred in its conclusions of law.

"6. In overruling appellants' motion to modify the judgment.

"7. In overruling appellants' motion for a new trial.

"The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter-claim and cross-complaint of appellee. An examination of the record discloses that the pleading to which refernce is here made was appellee's cross-complaint as amended after the decision of this court in the case of *Rooker vs. Fidelity Trust Company*, 185 Ind. 172.

"The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court in this case and the exhibits attached to said cross-complaint no suffi-

cient cross-complaint or counter-claim could have been written against appellants. This phase of the case need not be discussed in disposing of these motions for it is settled law that error can not be predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading.

Woodhams vs. Jennings, 164 Ind. 555;
Pfau vs. State ex rel. 148 Ind. 539.

"In support of their second alleged error appellants claim that the appellee trust company could not in any event, by counter-claim sue the appellants on the subject matter of the trust estate on the facts set upon in the counter-claim for the reason that the counter-claim is not relevant or germane to the complaint.

"The arguments presented by appellant in favor of their demurrers are in substance that the appellee was guilty of wrongful management of the trust property and sought to acquire title to it by wrong doing and that the trustee elected to repudiate the trust agreement and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost and it has no right to recover the sums of money expended by it for the use and benefit of the appellants.

"A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor, of the defendant or which tend to reduce the plaintiff's claim or demand for damages.—Burns 1914, 355.

"A counter-claim is good and germane to the principal case if it alleges matters connected with the subject of the original action.—*Stanley vs. N. W. Ins. Co.*, 95 Ind. 254. *Excelsior Clay Works vs. DeCamp*, 40 Ind. App. 26.

"A counter-claim under code provisions like ours is the equivalent of the cross bill in equity and in addi-

tion includes common law recoupment.—*Woodruff vs. Garner*, 27 Ind. 4.

"The purpose of a crossbill is to obtain full relief for all parties and a complete determination of all controversies which arise out of the matters charged in the original bill.—10 R. C. L. p. 483.—261 et seq.

"In this case the transaction having been brought into a court of equity by appellants it was not only the right of the court to entertain a crossbill which would settle all the rights of all the parties in all of their relations in the subject matter, but it was the duty of the court if necessary, to require a cross bill to be filed which would enable it to completely settle the controversy. See *Sims vs. Burk*, 109 Ind. 214.

"A party who imagines he has two or more remedies or who misconceives his rights is not deprived of all remedy because he first tries a wrong one. *Bunch vs. Graves*, 111 Ind. 351. *Nave vs. Powell*, 62 Ind. App. 274.

"The doctrine of election of remedies is of equitable origin. It has no application to the circumstances of this case for to apply it here would work to the great harm and loss of the appellee trust company, and the unearned and undeserved large money benefits to appellants, moreover it does not apply unless in fact, two remedies are available, which is not true in this case, as the Supreme Court has decided in 185 Ind. 172. The court did not err in overruling the demurrers to the second amended counter claim.

"In support of their third alleged error the appellants argue at length that the counter-claim was illegal. The object of a motion to make a pleading more specific is to require the pleader to state with certainty what is vaguely stated in the pleading. Elliott's App. Proc. 665. *Failey vs. Gribbling*, 128 Ind. 110.

"The appellee, in its counter-claim set up very fully and in circumstantial detail the trust and its relation

of it, and its title and doings as trustee, and the items of its account and the circumstances requiring the aid of the court in finally carrying out and closing the trust. There is no uncertainty or vagueness of statement and it is not claimed by appellants that there is. Their motion is based on what they call the illegality of the claim. The court did not err in overruling their motion to make more specific.

"The fourth error relied on for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment on a special finding of facts is not recognized by our practice. It is elementary that the sufficiency of the evidence to sustain the finding is raised by a motion for a new trial and that questions of law raised by the conclusions of law stated on a finding can be presented only by exceptions taken to the conclusions of law. The court did not err in overruling appellants' motion for judgment on the special finding of facts.

"It appears from the record that after the court filed its special finding of facts and conclusions of law thereon, the plaintiffs each respectively moved the court for judgment in their favor on the special finding of facts and when such motions were overruled they excepted to the conclusions of law. Under such circumstances the exceptions are not available.

"Exceptions to conclusions of law upon facts specially found must be taken before the taking of any other step in the cause by the excepting party.

Dickson et al vs. Rose, 87 Ind. 103;
See also *Barner vs. Bayless*, 134 Ind. 600;
Chicago R. R. vs. State ex rel., 159 Ind. 237;
Medical College vs. Commingore, 140 Ind. 296.

"Though it was taken on the same day that the ruling was made, an exception will not be available if it was not taken until after additional steps in the prose-

cution or defense of the case had been taken by the party reserving it. Ewbank's Manual (2d. Ed.) 24b.

Dickson vs. Rose, 87 Ind. 103;

Barner vs. Bayless, 134 Ind. 600.

The correctness of the conclusions of law can not be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. *Chicago S. E. Ry. Co. vs. State ex rel.*, 159 Ind. 237. The judgment rendered in this case was in conformity with the conclusions of law.

The seventh error relied on for reversal by appellants is that the court erred in overruling their motion for a new trial. In support of their contention to show that the court erred in overruling said motion the appellants say that the cause was put at issue and tried on an unlawful cross-complaint; and that therefore the judgment was contrary to law. This contention was decided adversely to appellants in our ruling on the demurrers to the cross-complaint and counter-claim. The brief of appellants does not contain a condensed recital of the evidence in narrative form as required by the rules.

A statement of the evidence mixed with statements and arguments of counsel, propositions of law and citation of cases and which clearly does not purport to cover the entire evidence, does not comply with the rules of this court and does not command a consideration of a motion for a new trial involving the evidence. *Rose vs. City of Jeffersonville*, 185 Ind. 577 and cases there cited.

No question is presented on the sufficiency of the evidence. Judgment affirmed.

Printed Tr., pp. 445-69.

PETITION FOR REHEARING.

In Indiana a petition for rehearing is a statutory right and, like an assignment of errors, it is addressed

to the judgment of the court rather than to the courts discretion. The statute provides: "At any time within sixty days after such determination, either party may file a petition for rehearing; if not so filed, the decision and instructions of the Supreme Court shall be certified to the court below, unless otherwise ordered by the court." 1 Burns R. S. 1914, Sec. 704.

On August 11, 1921, the appellants who are the petitioners here, filed their petition for a rehearing. This pleading presented newly discovered matter to the effect of disqualifying Judge Louis B. Ewbank, a member of the court, and the petition was therefore verified. It was in substance to the effect following:

"The appellants and each of them respectfully petition the court for a rehearing in the above entitled cause on each of the following grounds, to-wit:

"First. That the opinion and judgment of the Supreme Court of Indiana is erroneous in sustaining the judgment of the Hamilton Circuit Court of Indiana, which was erroneous in sustaining the constitutionality of the act of the general assembly of Indiana entitled, 'An Act concerning proceedings in civil and criminal cases,' approved March 15, 1913 (Acts 1913, page 850), which said act impairs the obligation of the trust agreement made and entered into on the 11th day of October, 1909, by and between the appellant, Dora E. Rooker, her husband and co-appellant, William V. Rooker, joining with her, and the Fidelity Trust Company, as trustee, whereby said Dora E. Rooker appointed and constituted the Fidelity Trust Company, trustee, to assume and perform certain trusts and powers stated and defined in the written memorandum of said contract and which said trust said Fidelity Trust Company, as trustee, accepted and undertook to perform upon the terms and in the form and manner prescribed in said contract, said contract being the same contract in issue in this suit, and because said

statute so impairs the obligation of said contract and statute is in contravention of Article I, Section 10 of the Constitution of the United States and is void.

"Second. That the opinion and judgment of the Supreme Court of Indiana is erroneous in sustaining the judgment of the Hamilton Circuit Court of Indiana, which was erroneous in that it denied to these appellants, and to each of them due process of law and the equal protection of the laws for the defense of their property and the enforcement of their rights, in contravention of the Fourteenth Amendment of the Constitution of the United States, said denials of due process and of the equal protection of the laws being in each of the particulars following, to-wit:

"1. Said judgments and each of them deny to these appellants and to each of them the common, ordinary and usual remedies of the law for the defense and enforcement of their rights of contract affected in the premises as hereinafter more specifically set forth.

"2. Said judgments and each of them take the property of these appellants and each of them without their having had their day in court upon any issue tendered by any person competent and qualified to sue for the determination of said rights of property, or any of them.

"Third. That the opinion and judgment of the Supreme Court of Indiana is *coram non judice* and void because of the participation therein of Judge Louis B. Ewbank, a member of said court who was incompetent and disqualified to sit because of adverse interests in his behalf then and there existing, had and entertained by him, apparent on the following facts:

"(1) There was introduced and read in evidence on the trial of this cause in said Hamilton Circuit Court, over the objections of these appellants a transcript of the record of the judgment of the Marion Circuit Court of Indiana in Cause No. 25260; that in said Cause

25260 these appellants were plaintiffs and George V. Coffin, as Sheriff of Marion county, in the State of Indiana and the Fidelity Trust Company in its corporate capacity proper, were defendants; that said suit was to the effect that certain unlawful liens and incumbrances had been placed on certain Marion county lands of these appellants by means of pretended sheriff's sales thereof; that said Marion county lands are the identical Marion county lands described in the deed of trust herein as being the Marion county lands of these appellants conveyed to said trustee; that said sheriff's sales were made upon a certified copy of the judgment and decree of said Hamilton Circuit Court which judgment and decree was thereafter set aside and vacated by this court on the 5th day of October, 1915 (185 Ind. 172); that in and by their said action these appellants as said plaintiffs sought to have the title of, in and to said Marion county lands cleared of the cloud placed thereon by said sales; that said action was begun by these appellants, as said plantiffs, filing their complaint in the office of the clerk of said Marion Circuit Court and causing summons to issue thereon for the defendants named; that said complaint was filed on, to-wit, the 26th day of May, 1915; that Charles E. Cox, Esq., at present one of the attorneys in this cause of said Fidelity Trust Company was a judge of the Supreme Court of Indiana, at the time said opinion and judgment of this court was rendered on the 5th day of October, 1915, reversing said judgment and decree of said Hamilton Circuit Court, and apparently he participated in the rendition of said judgment of this court and concurred therein; that when he retired from membership in this court said Cox appeared as attorney and counsel for appellee the Fidelity Trust Company in the matters in controversy in this suit affecting this trust and he with another, filed in said Cause No. 25260 in said Marion Circuit Court the

cross-complaint of said Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, and caused summons to be issued on said cross-complaint for said Dora E. Rooker and William V. Rooker; that said cross-complaint was on the theory that said cross-complainants had been continuous and faithful in the performance of their duties in the administration of said trust and that they had faithfully performed said duties; that said Dora E. Rooker and William V. Rooker had by their said trust deed conveyed all their interest in said trust estate; that said Dora E. Rooker and William V. Rooker were wrongfully and unlawfully meddling with said property and were interfering with and preventing said defendants from performing the duties required in the administration of said trust; that said Dora E. Rooker and William V. Rooker should be adjudged to have no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that throughout said proceedings said Cox had appeared in his individual name and not in the name of his firm, Woollen, Cox & Welliver, of which firm Mr. Evans Woollen is and for many years last past has been president of the Fletcher Savings and Trust Company, one of the oldest and one of the largest trust companies in Indiana; that said Ewbank, as said judge of said Marion Circuit Court found against these appellants as plaintiffs in said cause and he sustained said cross-complaint on the trial of said cause and rendered judgment accordingly, including that these appellants there present as plaintiffs in said complaint and as defendants in said cross-complaint had no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that said judgment was given and rendered by said Ewbank on the 5th day of February 1918, and he fixed the penalty

of the appeal bond therein at five thousand dollars, which these appellants were unable to give because their property was in the hands of said trustee; that on the 29th day of May, 1918, these appellants, as said plaintiffs, filed in the office of the clerk of this court their certified copy of the record proceedings and judgment of said Marion Circuit Court in said Cause No. 25260, together with assignments of error thereon and caused notice to be issued thereon; that said cause was docketed in this court as Cause No. 23477, but was afterwards transferred to the docket of the Appellate Court of Indiana as Cause No. 10444, where the same is pending for decision; questions at issue in said Cause No. 25260 and determined by said Ewbank and carried into the record in this cause by the introduction in evidence in this cause of said Judgment in said Marion Circuit Court in said Cause No. 25260, embody issues involved in this appeal, all to the effect that said Ewbank in sitting as a judge in this cause in this court is required to pass upon his own errors while sitting as a judge in said Cause No. 25260 in said Marion Circuit Court; that said action of said Ewbank in sitting in the determination of this court is beyond the precedents and traditions of this court; that appellants knew that said Ewbank sat with the other members of this court at the oral argument of this cause, but appellants then believed, as they lawfully might do, that he came upon the bench without information as to the nature and issues of this cause and that he would recuse himself and not participate further when he became informed; but appellants say that the memorandum of the opinion of this court filed in the office of its clerk in this cause, contains no notation that said Ewbank did not sit and that the text of the said opinion as published in the advance sheets of the North Eastern Reporter does not disclose that said Ewbank did not sit; that it is a custom and usage, and may be said

to be a rule of this court, to note on the memorandum of opinions and judgment where a judge does not participate in the decision of a cause, and, knowing these things and upon the information they impart, and believing them to be true, appellants say that Judge Ewbank sat in the determination of this cause while he was incompetent and disqualified to sit.

"(2) And as to the further interest of Judge Louis B. Ewbank in the matters and things involved in this cause and the precedents to be established thereby to the benefit and advantage of trustees, appellants say that in and by the last will and testament of one Volney T. Malott, late of said Marion county, the said Louis B. Ewbank was nominated and appointed co-executor and co-trustee of the estate of said Malott, valued at many millions of dollars and embracing holdings of stock in banks and trust companies competent under the law to accept and execute trusts of the kind and character of the trust involved in this suit; that among said holdings of stock in banks and trust companies by said Ewbank and his co-executors and co-trustees are First National Bank, Brazil, Indiana, stock valued at $30,000.00; Indiana National Bank, Indianapolis, Ind., stock valued at $662,500.00; Union Trust Co., Indianapolis, Ind., stock valued at $65,000.00; that it would be greatly beneficial to said banks and trust companies and enhance the value of the stock of said banks and trust companies to have the law established as being that trustees were not liable for the mal-administration of their trusts nor for the waste and conversion of their trust estate and that a trustee could not be held to respond to the complaint of a *cestui que trust* that the trustee was guilty of mal-administration of a trust and waste and conversion of the trust estate, and that there was no party in interest competent to invoke the jurisdiction of a court to command a trustee to fidelity in the adminis-

tration of a trust, nor to invoke the jurisdiction of a court to determine that a trust agreement, of the nature and kind affected by this suit, could be adjudged to have been repudiated by the trustee and thereupon rescinded by the parties aggrieved, nor to invoke the jurisdiction of a court to remove a trustee who was at fault and to sequester the trust estate by the appointment of a receiver therefor to the end that the trust estate could be administered for the benefit of all the parties in interest and not solely for the benefit of the trustee; that said Volney T. Malott departed this life June 14, 1921, at said Marion county; that at the time of his death he was more than eighty years of age; that on the 8th day of March, 1916, said Malott, knowing his advanced years and comprehending the near approach of his death in the usual processes of nature, executed his said will wherein he nominated the said Louis B. Ewbank, together with Thomas H. Kaylor and John Malott Fletcher, co-executors of his said will with the right of survivorship and in and by his said will he appointed said Ewbanks, Kaylor and Fletcher co-trustees of his estate, with the right of survivorship, said trusteeship to become effective when the statutory period had expired for the administration of said estate and the final settlement thereof, usually a minimum of thirteen months after the issuance of letters, and said trusteeship was thereafter to continue in said Ewbank, Kaylor and Fletcher, and in the survivor of them, until the second day of March, 1944, an approximate period of twenty-three years, when said trust was to be closed and the proceeds thereof distributed as provided in said will, said trustee to take credit for their charge, including certain annual charges payable out of the income of said estate; that said Kaylor and Fletcher are bank clerks and said Ewbank is the only lawyer among said co-executors and said co-trustees; that these appellants are in-

formed and believe, and upon information and belief state the fact to be, that said Ewbank knew of his appointment as said executor and trustee and of the interests, duties, rights, powers, opportunities and all the circumstances thereof, when the same was made, and that he had such knowledge on the 5th day of February, 1918, when as circuit judge he heard and determined said Cause No. 25260 in said Marion Circuit Court; that these appellants did not have nor did either of them have, any knowledge whatsoever as to the said will of said Malott nor as to any provision thereof, nor as to the appointment of said Ewbank as such co-executor and co-trustee until after said will was probated in the Probate Court of said Marion county on the 20th day of June, 1921, when the provisions of said will were set forth in the daily newspapers and those publications imparted to these appellants, and to each of them, the first information and the first means of information, they and each of them, had as to said last will and testament and as to any of its provision and that said Ewbank had any of the interests, duties, rights, powers, opportunities and purposes which he now has, holds, entertains and enjoys; that upon the probate of said last will and testament said Ewbank duly accepted said trust and qualified and is now a duly incumbent co-executor of said will, and he intends to and will perform the office of said trust until the time arrives when he should qualify as co-trustee of said estate, valued at many millions of dollars, under said will; that he intends to, and then will, assume the office of said co-trustee and qualify as such; that prior to the decision of this case by the Supreme Court of Indiana, it always had been the law of this state that the maxim prevailed, *nemo debet esse judex in propria sua causa*—no one ought to be a judge in his own cause—and that judicial proceedings were void where the judge who made the ruling had an interest which

might affect him in the performance of his duty in the premises; that upon the premises the said judgment of said Marion Circuit Court in said Cause No. 25260 was unlawful and void and its introduction in evidence on the trial of this cause was unlawful and the participation of said Ewbank in the consideration of this cause was unlawful and denies to these appellants and to each of them due process of law and the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

"Fourth: The opinion and judgment of the Supreme Court of Indiana wrongfully and unlawfully burdens, obstructs and defeats the rights of these appellants to present for consideration the federal questions, and each of them, that said opinion and judgment impairs the obligations of plaintiffs' said trust contract of October 11, 1909, in contravention of Art. I, Sec. 10, of the Constitution of the United States, and that said opinion and judgment deprive these appellants and each of them of property without due process of law, and deny to these appellants and each of them the equal protection of the laws, all in contravention of the Fourteenth Amendment of the Constitution of the United States; that said opinion and judgment does so burden, obstruct and defeat the said rights of these appellants, and each of them, to present said federal questions and each of them by (1) wrongfully and unlawfully adding to the terms and conditions imposed by the Supreme Court of the United States upon which a federal question may be raised and presented, certain alleged rules, interpretations and dicta and (2) by erroneously, wrongfully and unlawfully construing and applying said alleged rules, interpretations and dicta as applied to this case and all in the form and manner and to the effect following, that is to say: In appellants' original brief on the merits filed in the Supreme Court of In-

diana in this cause, on to-wit the 15th day of December, 1919, the following appears, beginning on page 286, to-wit: [Here follow argumentative points and authorities to sustain the text. These points and authorities appear in the Printed Transcript at pages 475-493.]

SECOND FINAL JUDGMENT OF THE SUPREME COURT OF INDIANA.

The record contains the following entry showing the dependence of the court's judgment upon the petition for rehearing:

"And afterwards, to-wit: On the 12th day of October, 1921, being the 123rd judicial day of the May term, 1921, of said Supreme Court, the following further pleas and proceedings were had herein: Come the parties and the court being sufficiently advised denies the petition for rehearing heretofore filed herein by appellants and orders judgment for the apellee herein."

ASSIGNMENT OF ERRORS IN THIS COURT.

Along with their petition for a writ of error in this court the plaintiffs in error tendered their assignment of error, in substance as follows:

"Dora E. Rooker and William V. Rooker, plaintiffs in error in the cause above entitled, in connection with their petition for a writ of error herein, make this their assignment of errors against the Fidelity Trust Company, in its corporate capacity proper, and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, defendants in error, and plaintiffs in error, say: That there is manifest error in the record, proceedings and judgment of the Supreme Court of Indiana, in this action in each of the particulars following, to-wit:

"1. The Hamilton Circuit Court of Indiana erred

in overruling the motions of these plaintiffs in error to strike out the record amended counter claims and cross-complaints of the defendants in error, which said motions in said circuit court were to the effect that said second amended counter claim was vague, indefinite and uncertain and tendered no issue; that in the nature of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of a *quantum meruit* with valuations as fixed by the said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of a *quantum valebat* founded upon acts done by the said defendant to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by said defendant to the damage of said trust estate, and which said excess in value of benefits over damage the said trust estate had accepted and appropriated to its own use, benefit and advantage; that said second amended counter claim averred facts inconsistent with and contradictory of the statement therein 'that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed,' and that because of such inconsistencies and contradictions, the said averment was nullified and destroyed, to-wit, the averment 'that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed,' and that in the premises there was

no issue tendered by said second amended counter claim that said defendant was entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendant of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendant upon said counter claim; that said second amended counter claim averred no facts in excuse of the failure on defendants' part to make full and complete performance of said so-called trust agreement, and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendant was entitled herein to employ said trust agreement to fix the value, as upon *quantum meruit*, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement, and plaintiffs said that in the premises there was no issue tendered by said second amended counter claim that the said defendant was entitled to any recovery whatsoever as upon an issue the *quantum meruit* against these plaintiffs in favor of said defendant upon said counter claim; that said second amended counter claim averred no facts founded upon acts done by said defendant to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by said trust estate because of any failure, omission or wrong done by the said defendant to the damage of said trust estate and which said excess in value of benefits over damages the said trust estate had accepted and appropriated to its own use, benefit and advantage; that upon the facts in the premises said second amended counter claim tendered no issue whatsoever in favor of defendant and was useless and could accomplish no proper and lawful purpose in this cause and was a needless encumbrance of the record and should be stricken from the files herein.

Printed Tr., pp. 497-8.

"2. The Supreme Court of Indiana erred in affirming the action of the Hamilton Circuit Court of Indiana in overruling the motions of these plaintiffs in error to strike out the second amended counter claim and cross-complaint of the defendants in error, which motion included the grounds that on account of the former decision of the Supreme Court of Indiana in this cause and the exhibits attached to said cross-complaint no sufficient cross-complaint or counter claim could have been written singly by said trustee or jointly by said trustee and another founded upon and to secure the further performance by said trustee of the said trust deed, as an executory contract, exhibited with and made a part of said second amended counter claim.

Printed Tr., p. 498.

"3. The Hamilton Circuit Ciurt of Indiana erred in overruling the demurrers of the plaintiffs in error to the several second amended counter claims and cross-complaints of the defendants in error, for want of sufficient facts to constitute a cause of action, which said demurrers were to the effect that in the nature of the action said counter claims should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of *quantum meruit* with valuation as fixed by the said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement or (3) upon the single and definite theory of *quantum valebat* founded upon facts done by the said defendant to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value

the damages suffered and sustained by the said trust estate because of any failure, omission or wrong done by said defendant to the damage of said trust estate, and which said excess in value of benefits over damages said trust estate had accepted and appropriated to its own use, benefit and advantage; that said second amended counter claim averred facts inconsistent with and contradictory of the statement therein 'that said cross complainant has fully and duly performed all of the conditions on its part to be by it performed,' and that because of such inconsistencies and contradictions the said averment is nullified and destroyed, to-wit, the averment 'that said cross-complaint has fully and duly performed all of the conditions on its part to be by it performed' and that in the premises there was no issue tendered by the said second amended counter claim that the said defendant was entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendants of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendant upon said counter claim; that said second amended counter-claim averred no fact in excuse of the failure on the defendant's part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendant was entitled herein to employ said trust agreement to fix the value as upon *quantum meruit* of any act or acts done or claimed to have been done by said defendants under and by virtue of said trust agreement, and plaintiff said that in the premises there was no issue tendered by said second amended counter claim. That the defendants were entitled to no recovery whatsoever as upon an issue of the *quantum valebat* against these plaintiffs in favor of said defendants upon said counter claim; that said second amended counter claim

averred no fact founded upon acts done by said defendants to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value the damage suffered and sustained by said trust estate because of any failure, omission or wrong done by the said defendants to the damage of said trust estate, and which said excess in view of benefits and other damages the said trust estate had accepted and appropriated to its own use, benefit and advantage.

Printed Tr., pp. 498-9.

"4. The Supreme Court of Indiana erred in affirming the action of the Hamilton Circuit Court of Indiana, in overruling the demurrers of the plaintiffs in error to the several second amended counter claims and cross-complaints of the defendants in error for want of sufficient facts to constitute a cause of action, and upon the ground that plaintiffs in error claimed that the appellee trust company could not in any event by counter claim sue the appellants on the subject matter of the trust estate on the facts set up in the counter claims for the reason that the counter claims were not revelant or germane to the complaint. And upon the further grounds that the plaintiffs in error claimed by their demurrers that the defendants in error were guilty of wrongful management of the trust property and sought to acquire title to it by wrong doing and that the trustee had elected to repudiate the trust agreement and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost and it had no right to recover the sums of money expended by it for the use and benefit of the appellants; and by holding that the doctrine of election of remedies had no application to the circumstances of this case. For to apply it here would work to the great harm and loss of the appellee trust company and the unearned and undeserved large money benefits to appellants and that in fact the doc-

trine of election of remedies did not prevail unless two remedies were available, and that two remedies did not exist in favor of the defendants in error in this case.

Printed Tr., pp. 499-500.

"5. The Hamilton Circuit Court of Indiana erred in overruling the demurrers of the plaintiffs in error to the joint second amended counter claim and cross-complaint of the defendants in error for the reasons:

"(1) That several causes of action had been improperly joined;

"(2) That the facts stated in said counter claims were not sufficient to constitute a joint cause of action in said defendants and

"(3) That the facts stated in said counter claims were not sufficient to constitute a joint cause of defense; that said demurrers were to the effect that the exhibits filed with said counter claim, which exhibits controlled the averments of said counter claim, disclosed upon their cases the existence of two separate and distinct interests, estates, capacities and powers which as to each other were contradictory and adverse in the defendants, the Fidelity Trust Company on the one hand as trustee and the Fidelity Trust Company in its corporate capacity proper on the other hand, viz:

"(1) Certain interests, estates, capacities and powers alleged to have been acquired and owned and held by said Fidelity Trust Company *ex-officio* as trustee for each and all of these plaintiffs and of which interests and estates these plaintiffs were the equitable owners, subject only to such rights in the premises as said trustee might have under color or by virtue of its office, and of which said capacities and powers these plaintiffs were the grantors, all as more particularly set forth in two certain deeds of conveyance and one certain trust agreement executed in writing and concurrently on the 11th day of October, 1909, and which

said written instruments were exhibited and at large set forth in said counter claim;

"(2) Certain interests, estates, capacities and powers alleged to have been acquired, held and owned by said Fidelity Trust Company in its corporate capacity proper and not in its right *ex-officio* as said trustee and all which interests and estate these plaintiff never had been, were not now and never could be the owners equitably or otherwise as grantors to said Fidelity Trust Company in its corporate capacity proper, but which said interests and estates were adverse and hostile to the interests and estates of these plaintiffs and of said Fidelity Trust Company, *ex-officio* as such trustee in the premises. And of which capacities and powers these plaintiffs were not the grantors, but on the contrary, said capacities and powers were exclusive of these plaintiffs and arose out of the act of incorporation of said company and were created and conferred by law; that the said interests, estates, capacities and powers of said trust, *ex-officio* arose out of said contract executed in writing by and between these plaintiffs in error and said trustee, in form said deeds of conveyance and said trust agreement of date October 11, 1909, and being so created, limited and defined were such that they could not nor could any of them be alienated from the welfare and cause of these plaintiffs nor altered and amended without their consent, nor appropriated and converted by said trustee while acting under and within the terms, authority, province and purpose of said contract, without violating the terms of such contract in such manner and to such effect and intent as to deny to and defeat in said trustee the right to apply said contract and the performance thereof as the foundation and source of said trustee's right to recover herein upon the terms of such contract; that the interests, estates, capacities and powers of said Fidelity Trust Company in its corporate capacity proper

being derived from and conferred by law and not by contract with these plaintiffs, were alien, hostile and adverse to the cause of these plaintiffs and that these plaitniffs had not nor had either of them now nor at any time heretofore any interests, estates, capacities or powers within the function of said Fidelity Trust Company in its corporate capacity proper; that by reason of the said distinction and differences which existed between the interests, estates, capacities and powers, *ex-officio* of the said trustee on the one hand and of said Fidelity Trust Company in its corporate capacity proper on the other hand, there was no identity, community nor unity of right in the said respective interests, estates, capacities and powers such as would authorize, enable and permit said respective interests, estates, capacities and powers to be declared upon at one and the same time and as the joint and common interests, estates, capacities and powers of said trustee, *ex-officio* and of said Fidelity Trust Company in its own corporate capacity proper; that for as much as the defendants asserted solely and only a joint interest and an interest in common between them arising upon the facts which in law denied and defeated any joint interest and any interests in common and any common and single interest, estate, capacity and power, therefore these plaintiffs said that neither of said defendants had stated facts in said counter claim which constituted either a cause of action or a cause of defense in either of said defendants severally, or jointly; that plaintiffs further said in their said demurrer that if the court should be persuaded that said counter claim stated solely and only separate rights of action, viz: a right of action in said trustee *ex-officio* on the one hand and a right of action in said Fidelity Trust Company in its corporate capacity proper on the other hand, then would the court order said misjoinder to be noted upon the order book of the court and cause

as many separate actions to be docketed between the parties as there were causes decided by the court to be improperly joined; and the plaintiffs further said in their demurrer that in the nature of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust agreement, purporting to have been executed by the parties hereto, or (2) upon the single and definite theory of *quantum meruit* with valuations as fixed by said trust agreement and founded upon the partial and incomplete performance of the so-called trust agreement with such statements of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of *quantum valebat* founded upon acts done by the said defendants to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value the damages suffered and sustained by said trust estate because of any failure, omission or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate had accepted, appropriated and retained to its own use, benefit and advantage; that said second amended counter claim averred facts inconsistent with and contradictory of the statement therein 'that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed,' and that because of such inconsistencies and contradictions the said averment is nullified and destroyed, to-wit, the averment 'that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed.' And that in the premises there was no issue tendered by the said second amended counter claim that the said defendants were entitled to any re-

covery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendants of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendants upon said counter claim; that further said counter claim averred no fact in excuse of the failure on defendants' part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendants were entitled herein to employ said trust agreement to fix the value as upon *quantum meruit* or any act or acts done or claimed to have been done by said defendants under and by virtue of said trust agreement, and that in the premises there was no issue tendered by said second amended counter claim that said defendants were entitled to any recovery whatever as upon an issue of *quantum meruit* against these plaintiffs in favor of said defendants upon said counter claim; further, that said second amended counter claim averred no fact founded upon acts done by said defendants to the credit, use, benefit and advantage of said trust estate in the aggregate exceeding in value the damages suffered and sustained by said trust estate because of any failure, omission or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate had accepted, retained and appropriated to its own use, benefit and advantage.

Printed Tr., pp. 500-2.

"6. The Hamilton Circuit Court of Indiana erred in overruling the motion of this plaintiff for an order herein to require the defendant to make more certain and specific as to each of the several particulars respectively enumerated in said second amended counter claim, said several particulars being as follows, to-wit:

"*First:* If it be true, as counter claims says it is

true, that said defendant 'has fully and duly performed all of the conditions on its part to be by it performed,' then state the facts which cause or excuse as the case may be, the delay on your part in closing up the affairs of said trust during the time of which delay interest charges have accumulated against said trust estate, you say, in the aggregate sum, to-wit, $10,000.

"*Second:* State the facts which cause or excuse, as the case may be, your failure to apply the proceeds of any sale or sales of said real estate made pursuant of said trust agreement as follows: (1) To the payment of any mortgage or other valid lien, charge, adverse interest or incumbrance upon and against said real estate or any part of the real estate herein described which may be prior and superior and adverse to the interests of the Fidelity Trust Company. (2) To the payment of the moneys advanced by second party to first parties or paid to the use and genefit of first parties as in said trust agreement authorized and provided. (3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as in said trust agreement authorized and provided. (4) To pay to the said Dora E. Rooker, her heirs, executors, administrators and assigns the rest and residue remaining of any money arising from the sale of said real estate.

"*Third:* State the facts which cause or excuse as the case may be, the maturity of the debt which you charge against the plaintiffs.

"*Fourth:* State the dates on which matured, if at all, the debt which you charge against the plaintiffs.

"*Fifth:* State the facts which constitute the duty and necessity if any of your part, to have employed attorneys, viz: Mr. Henry Seyfried and Messrs. Kane and Kane on the occasions when and for the services in which they were so employed.

"*Sixth:* If it be not in fact true, as stated by you to be true, that you have fully and duly performed all of the conditions of said trust agreement on your part to be performed, then state the facts, if any, in the conduct, action and behavior of these plaintiffs or either of them which constitute the cause or excuse, as the case may be, the failure on your part to carry out and perform the conditions of said trust agreement on your part to be performed.

"*Seventh:* If it be not in fact true as stated by you to be true, that you have fully and duly performed all the conditions of said trust agreement on your part to be performed, and if such failure on your part be not due to the conduct, action or behavior of these plaintiffs or either of them, then state the facts which constitute the cause of your failure to carry out and perform the conditions of said trust agreement on your part to be performed.

"*Eighth:* As to the alleged interest designated in said counter claim as the American Central Life Insurance Company mortgage, state the fact or facts which constitute your right to have acquired said mortgage by purchase and assignment and your right now to assert said mortgage interest as one hostile and adverse to your said interests and duties as trustee under and by virtue of said trust agreement, or, in the alternative, if said mortgage was by you acquired as an act of repudiation on your part of said trust agreement, then state such, all such facts as an alternative showing all to the end that these plaintiffs may be advised whether said mortgage is pleaded as a fact within the terms of the trust or as a fact hostile and adverse to said trust.

Printed Tr., pp. 502-4.

"7. The Hamilton Circuit Court of Indiana erred in overruling the motions of these plaintiffs in error for judgment in their favor on the special findings, which

special findings were to the effect (1) an exhibit at large of the trust agreement and the trust deeds affected in the premises by the parties on the 11th day of October, 1909. (2) That since the execution of said trust agreement the plaintiff, Dora E. Rooker, has continued in possession of all said lands. (3) That since the execution of said agreement, Dora E. Rooker has received the proceeds of said lands and has not at any time rendered an accounting therefor to the Fidelity Trust Company as trustee. (4) That the Fidelity Trust Company as trustee has not sold nor conveyed any part of said trust estate conveyed to it by the plaintiffs, but that the title of said trust esate is now in said Fidelity Trust Company, trustee, 'and that said Fidelity Trust Company is not claiming or asserting any other title than the title and right set forth in the deeds of conveyance and memorandum of trust hereinafter set out in these findings.' (5) 'That prior to the commencement of plaintiff's action, viz: on or about the 28th day of October, 1912, the defendant and cross-complaint Fidelity Trust Company, trustee, served a written notice upon the plaintiffs demanding the payment of a certain sum aggregating nineteen thousand six hundred and four and four hundredths dollars ($19,604.04) and tendered for delivery its quit claim deeds conveying and quit claiming said Hamilton county and said Marion county lands to the original grantors upon the payment of aforesaid sum upon demand and stating that said quit claim deeds 'will remain in the office of the Fidelity Trust Company for delivery until October 30, 1912, upon the payment of the demand.' (6) That in and about the erection and construction of dwelling house on her Hamilton county land Dora E. Rooker contracted debts for work and labor done and materials furnished and for sums of money borrowed, and also contracted certain liabilities on account of the operation of said farm. That upon

orders executed by the said Dora E. Rooker to said Fidelity Trust Company as trustee for the payment of money to the creditors of said Dora E. Rooker, said trust company had laid out and expended fifteen thousand eight hundred and thirteen dollars and twenty-one cents ($15,813.21). (7) That pursuant of said trust agreement said trust company had also laid out and expended additional sums of money aggregating twenty-one thousand one hundred and ninety-four and twenty-seven hundredths dollars ($21,194.27). (8) That no assets came into the possession of said trustee other than the lands described 'and that all the moneys paid out by defendant and cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Indiana, a corporation engaged in the business of operating a trust company under the laws of the State of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced remains wholly unpaid.' (9) That by said agreement the said Fidelity Trust Company as trustee was to have certain fees which are stated. (10) That the plaintiffs are entitled to certain credits which are stated. (11) That there is now due and owing the defendant and cross-complainant herein the principal sum of thirty-seven thousand and seven and forty-eight hundredths dollars ($37,007.48), and for interest fourteen thousand two hundred and seventy-two and twenty-nine hundredths dollars ($14,272.29) and commission six hundred and twenty and fourteen hundredths dollars ($620.14). From which certain deductions are allowable, leaving a net aggregate balance due and owing to the defendant and cross-complainant of fifty thousand six hundred and ninety-seven and fifty-nine hundredths dollars ($50,697.59). That all the amounts advanced and paid out by the Fidelity Trust Company as trustee, 'as hereinbefore set out were advanced and paid out by it under and pur-

suant to said memoranndum and agreement of trust and deeds of conveyance hereinbefore set out to protect and preserve the trust estate, and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker, and her separate estate and were received by her and applied for such purposes and said Fidelity Trust Company, trustee, is entitled to reimburse itself therefor according to the terms of said trust agreement by the sale of such lands therein provided.' (12) That on the 21st day of June, 1917, the defendant Fidelity Trust Company, as trustee, served notice upon plaintiffs that it was proceeding to resume the execution of said trust, which said notice is exhibited at large in the special findings. (13) That after the execution of said trust agreement, William V. Rooker expressed and conveyed to defendant, Fidelity Trust Company, the intention of the plaintiffs to pay for said advancement. (14) That the Fidelity Trust Company, trustee, has used all due diligence to sell said lands mentioned and described in accordance with the provisions of said trust agreement. That the plaintiffs have been, then were and now are asserting an interest in said lands adverse to the rights of said trust company as trustee and disputing its right to make the sale of said lands under and pursuant to said trust agreement, and are prosecuting an appeal from a judgment in the Marion Circuit Court of Indiana, quieting the title of the Marion county lands in said Fidelity Trust Company as trustee and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as trustee to said Marion county lands and from denying and disputing, obstructing or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust; that the assertion of interest in said lands by plaintiffs as hereinabove stated adverse to the interest of the

Fidelity Trust Company as trustee under said trust agreement is unfounded and without right.

Printed Tr., pp. 504-5.

"8. The Hamilton Circuit Court of Indiana erred in each of its conclusions of law and these severally were to the effect as follows:

"*First:* That the law was with the defendant on the issues joined on plaintiffs' complaint.

"*Second:* That the law was with the cross-complainant on the issues joined on the defendants' cross-complaint.

"*Third:* That the legal title to the lands described in the deeds and instrument of trust set out in the finding of facts was held and vested in defendant Fidelity Trust Company, trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust and said defendant was entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

"*Fourth:* That the defendant and cross-complainant Fidelity Trust Company was entitled to proceed with the sale of said lands according to the terms of said deeds and trust agreement and to apply the proceeds as therein provided.

"*Fifth:* That the defendant and cross-complainant was entitled to judgment on account in the sum of $50,697.00 to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

"*Sixth:* That the defendant and cross-complainant was entitled to recover its costs in this action taxed at $————.

Printed Tr., pp. 505-6.

"9. The Supreme Court of Indiana erred in overruling each of the several exceptions of plaintiffs in

error to the respective conclusions of law of the Hamilton Circuit Court of Indiana.

Printed Tr., p. 506.

"10. The Hamilton Circuit Court of Indiana erred in overruling the motion of these plaintiffs in error to modify the judgment herein in each of several respects stated in particulars to the effect following:

"Particular No. 1. To strike out from the entry of said judgment the following words: 'It is, therefore, considered, ordered, adjudged and decreed by the court that plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described,' and for cause plaintiffs say that so much of said entry as above quoted contravenes the law of the case as decided by the Supreme Court on the former appeal.

"Particular No. 2. To strike out and suppress from said entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal.

"Particular No. 3. To strike out and suppress from said entry of judgment the following words, to-wit: 'By taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee by making sale of the same and by making distribution of the proceeds according to the term of said deeds and

trust agreement and not otherwise and in no other capacity.' And for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 4. To strike out and suppress from the entry of judgment the following words, to-wit: 'That said defendant and cross-complainant, Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under duty to sell and convey said lands by deeds of warranty of the fee simple title, and give full possession of the same.' And for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 5. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company is entitled to judgment on its action against said trust estate to be paid out of the proceeds of the sale of the trust so held in trust by it, as hereinbefore provided, in the sum of fifty thousand six hundred and ninety-seven dollars,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of such case as adjudged by the Supreme Court on the former appeal of this case.

"Particular No. 6. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging and the right of the possession thereof, and the use, rents and

profits thereof, and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement; that any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive to the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker, be and they are, each and both, hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession, and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands as aforesaid,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case, and the plaintiff would further show unto the court that said trust was not at any time a trust of investment, or representing a trust of investment or of income, but said trust was solely a trust affecting the principal of said trust estate and said trustee was to have been active only in making the trust sale in the matter of converting said trust estate into cash and the maintenance of said trust estate pending the sale and the distribution of the proceeds of said trust estate and said trust was not at any

time a trust affecting the possession, rents and profits thereof prior to such sale.

"Particular No. 7. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as trustee proceed under the power according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion county lands having failed to sell for the sum of eighteen thousand dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion county lands above described forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion county lands do not sell for lack of a bid then said trustee shall after giving said plaintiffs ninety (90) days' notice in writing of their intention to so do, sell and convey said Hamilton county lands for whatever sum they will bring over and above the upset price of sixty-five thousand dollars ($65,000.00); that if said Hamilton county lands do not sell for said sum of sixty-five thousand dollars ($65,000.00) for lack of a bid for that sum, then said trustee after ninety (90) days' notice in writing to plaintiffs of their intention so to do, shall sell said Marion county lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion county lands under this decree they do not fetch enough to pay the money and perform the obligations against

said trust estate in this action found to exist and be due, then said trustee shall, after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell and sell and convey said Hamilton county lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.' That for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 8. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made said trustee shall apply the proceeds of said sale or sales as follows: (1) To the payment of the costs of this action; (2) to the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described which may be prior and superior and adverse to the interest of said Fidelity Trust Company, trustee; (3) to the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of fifty thousand, six hundred and ninety-seven dollars ($50,697.00); (4) to the reimbursement of said Fidelity Trust Company of any sum or sums which may accrue to it in the execution of said trust after the date of this judgment and decree; (5) the rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns," and for cause plaintiffs say that so much of said entry of judgment as quoted

above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

Printed Tr., pp. 506-9.

"11. The Hamilton Circuit Court of Indiana erred in overruling the motions of these plaintiffs in error for a new trial.

Printed Tr., p. 509.

"12. The Hamilton Circuit Court of Indiana erred at the trial of the cause in overruling the motions of these plaintiffs in error to strike from their counter claim and answer the name of the Fidelity Trust Company in its corporate capacity proper, "And we ask that that motion be extended to include all pleadings in which the Fidelity Trust Company as trustee and the Fidelity Trust Company in its corporate capacity proper appear to be jointly litigating these particular rights the said motion more particularly appearing upon the record as follows: Upon the offer in evidence of a voucher in favor of George K. Keyser, objection was made that the memorandum now offered, "is offered both by the Fidelity Trust Company in its corporate capacity proper, pleaded as such in this case, and also by the Fidelity Trust Company as trustee, etc." That thereupon Mr. Seyfried of counsel for the defendants stated to the Court: "On behalf of the Fidelity Trust Company, I would like for the record to show that this payment, and all other payments made by it, were made by the Fidelity Trust Company pursuant to and under the agreement of trust and upon the security of the deeds of conveyance herein introduced; and that the only relation that the Fidelity Trust Company proper has thereto is that the Fidelity Trust Company as trustee had no funds belonging to the trust estate and that the funds with which the payment of this voucher, and all other vouchers, were made by and furnished by the Fidelity Trust Company. I state this in order that our position in this case may

not be confused by the distinction which the plaintiffs seek to make."

Printed Tr., pp. 509-10.

"No. 13. The Hamilton Circuit Court erred at the trial of the cause in admitting in evidence defendants' exhibit No. 3, being a voucher drawn on the Fidelity Trust Company and paid by it the Indianapolis Mortar and Fuel Company for $60.00 on September 10, 1909, the objection being stated in these words: "The plaintiffs by counsel object to that for the reason that there is no privity between the Fidelity Trust Company and these plaintiffs, except as the Fidelity Trust Company is trustee; that this exhibit is now offered by the trust company as trustee in conjunction with a party who is a stranger to the privity, and that this is not evidence in favor of both of them and, therefore, is not evidence in favor of either of them.

"That thereupon Mr. Seyfried of counsel for the defendants stated to the Court: "The trustee had no funds; the funds that were advanced were the funds of the corporation; that is the only thought in mind in this case, to bring to the attention of the Court, is that the principal of this trust fund furnished. We got no funds, no capital and that the capital was taken from the corporate treasury of the trustee."

Printed Tr., p. 510.

"No. 14. The seventeenth finding of fact made by the Hamilton Circuit Court of Indiana is not sustained by sufficient evidence and it is contrary to law. It is to the effect 'that all the amounts advanced and paid out by the defendant Fidelity Trust Company, trustee, as hereinbefore set out were paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance hereinbefore set out to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker and her separate estate and were re-

ceived by her and applied for such purpose and said Fidelity Trust Company, trustee, is entitled to reimburse itself therefor according to the terms of the trust agreement by the sale of the lands therein provided.'

Printed Tr., p. 510.

"No. 15. The thirteenth finding of fact of the Hamilton Circuit Court of Indiana, is not sustained by sufficient evidence and is contrary to law. It is to the effect: 'That no assets came into the possession of the trustee other than the lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company of Indianapolis, Indiana, a corporation, engaged in the business of operating a trust company under the laws of the State of Indiana, and that no part of the amount paid out and advanced has ever been repaid and that the full amount paid out and advanced, less credits hereinafter allowed remains wholly unpaid.'

Printed Tr., p. 510.

"No. 16. The sixteenth finding of fact made by the Hamilton Circuit Court of Indiana is not sustained by sufficient evidence and is contrary to law. It is to the effect that there is now due and owing to the defendant and cross-complainant herein from the plaintiffs' cross-defendants herein, the principal sum of thirty-seven thousand, seven and forty-eight hundredths dollars ($37,007.48); and for the interest thereon the aggregate sum of fourteen thousand, two hundred and twenty and twenty-nine hundredths dollars ($14,220.29); and for commission two (2) per cent. on all funds paid out in excess of six thousand dollars ($6,000.00) the aggregate sum of six hundred and twenty and fourteen hundredths dollars ($620.14) from which shall be deducted the aggregate sum of nine hundred and eighty-two and eighty-one hundredths dollars ($982.81), together with interest thereon amounting to two hundred and eighteen and

fifty-one hundredths dollars ($218.51) being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein the sum of fifty thousand, six hundred and ninety-seven and fifty-nine hundredths dollars ($50,697.59).

Printed Tr., p. 511.

"No. 17. That the 20th finding of fact made by the Hamilton Circuit Court of Indiana is not sustained by sufficient evidence and is contrary to law. It is to the effect: 'That said Fidelity Trust Company, trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said trust agreement hereinbefore set out, but that said Marion county lands were not sold within one year after the execution of said memorandum and deeds and have not yet been sold by said trustee under said trust provisions; that ninety (90) days notice in writing was given as set out in the previous findings, notifying plaintiffs of the proposed sale of said Marion county lands under said trust agreement; that plaintiffs have been, were then and are now asserting an interest in said lands adverse to the rights of said trust company as trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deeds of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton county lands adverse to the right of said trust company as trustee and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above. That the plaintiffs in open Court have disputed and now deny the right of said trust company as trustee to sell the lands conveyed to it in trust and are actively opposing such efforts to sell and are now resisting the sale of said lands or any of them by

said trustee and are now prosecuting an appeal in the Appellate Court from a judgment of the Marion Circuit Court, quieting the title of the Marion county lands in said Fidelity Trust Company as trustee and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as trustee to said Marion county lands and from denying, disputing, obstructing or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust; that the assertion of interest in said lands by plaintiffs as hereinabove stated adverse to the interest of Fidelity Trust Company as trustee under said trust agreement is unfounded and without right.

Printed Tr., pp. 511-2.

"No. 18. The Hamilton Circuit Court of Indiana erred at the time of the cause in admitting in evidence over the objection of these plaintiffs the defendants' exhibit No. 46, the same being the county treasurer's receipt of $87.46 for delinquent penalty and taxes on the Marion county lands, in Lawrence township, of the trust estate for the years 1916-1917, the objection of the plaintiffs to the introduction of said receipt being to the effect that at the time this payment was made the Fidelity Trust Company was claiming and had of record, the legal title to this property under proceedings adverse to the trust estate; that this payment, if made at all, was made in aid of the trust company's own wrong and in violation of the trust agreement, and, therefore, is not a charge against the trust estate; and that, at the time this payment was made, the title was of public record in the name of the Fidelity Trust Company under proceedings adverse to the trust estate.

Printed Tr., p. 512.

"No. 19. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the

Court's first conclusion of law, to the effect that the law was with the defendant on the issues joined on plaintiffs' complaint.

Printed Tr., p. 512.

"No. 20. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the Court's second conclusion of law, to the effect that the law was with the cross-complainant on the issues joined on the defendants' cross-complaint.

Printed Tr., p. 512.

"No. 21. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the Court's third conclusion of law, to the effect that the legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant Fidelity Trust Company, trustee, with full power to convey the same to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

Printed Tr., p. 512.

"No. 22. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the Court's fourth conclusion of law, to the effect that the defendant and cross-complainant, Fidelity Trust Company, was entitled to proceed with the sale of said lands according to the terms of said deeds and trust agreement and to apply the proceeds as therein provided.

Printed Tr., p. 512.

"No. 23. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiffs to the Court's fifth conclusion of law to the effect that the defendant and cross-complainant was entitled to judgment on account in the sum of $50,697.00 to be paid

out of the proceeds of such sale according to the terms of such trust deeds and trust agreement.

Printed Tr., pp. 512-3.

"No. 24. The Hamilton Circuit Court of Indiana erred in overruling the exceptions of plaintiff to the court's sixth conclusion of law to the effect that the defendant and cross-complainant was entitled to recover its costs in this action taxed at $————————.

Printed Tr., p. 513.

"No. 25. The Supreme Court of Indiana erred in affirming the judgment of the Hamilton Circuit Court of Indiana as to each of the several errors exhibited in this assignment of errors.

Printed Tr., p. 513.

"No. 26. The Supreme Court of Indiana erred in overruling the plaintiffs' verified petition for a rehearing to the effect:

"First: That the opinion and judgment of the Supreme Court of Indiana is erroneous in sustaining the judgment of the Hamilton Circuit Court of Indiana, which was erroneous in sustaining the constitutionality of the act of the general assembly of Indiana entitled, 'An act concerning proceedings in civil and criminal cases,' approved March 15, 1913 (Acts 1913, page 850), which said act impairs the obligations of the trust agreement made and entered into on the 11th day of October, 1909, by and between the appellant, Dora E. Rooker, her husband and co-appellant, William V. Rooker, joining with her, and the Fidelity Trust Company, as trustee, whereby said Dora E. Rooker appointed and constituted the Fidelity Trust Company trustee, to assume and perform certain trusts and powers stated and defined in the written memorandum of said contract and which said trust said Fidelity Trust Company, as trustee accepted and undertook to perform upon the terms and in the form and manner prescribed in said contract, said contract being the

same contract in issue in this suit, and because said statute so impairs the obligation of said contract said statute is in contravention of Article I, Section 10, of the Constitution of the United States and is void.

"Second: That the opinion and judgment of the Supreme Court of Indiana is erroneous in sustaining the judgment of the Hamilton Circuit Court of Indiana, which was erroneous in that it denied to these appellants, and to each of them due process of law and the equal protection of the laws for the defense of their property and the enforcement of their rights, in contravention of the Fourteenth Amendment of the Constitution of the United States, said denials of due process and of the equal protection of the laws being in each of the particulars following, to-wit:

"1. Said judgments, and each of them, deny to these appellants and to each of them, the common, ordinary and usual remedies of the law for the defense and enforcement of their rights of contract affected in the premises as hereinafter more specifically set forth.

"2. Said judgment and each of them take the property of these appellants and each of them without their having had their day in Court upon any issue tendered by any person competent and qualified to sue for the determination of said rights of property, or any of them.

"Third: That the opinion and judgment of the Supreme Court of Indiana is *coram non judice* and void because of the participation therein of Judge Louis B. Ewbank, a member of said court who was incompetent and disqualified to sit because of adverse interests in his behalf then and there existing, had and entertained by him, apparent on the following facts:

"1. There was introduced and read in evidence on the trial of this cause in said Hamilton Circuit Court, over the objections of these appellants, a transcript of the record of the judgment of the Marion Circuit Court

of Indiana in cause No. 25260; that in said cause 25260 these appellants were plaintiffs and George V. Coffin, as Sheriff of Marion county, in the State of Indiana and the Fidelity Trust Company in its corporate capacity proper were defendants; that said suit was to the effect that certain unlawful liens and incumbrances had been placed on certain Marion county lands of these appellants by means of pretended sheriff's sales thereof; that said Marion county lands are the identical Marion county lands described in the deed of trust herein as being the Marion county lands of these appellants conveyed to said trustee; that said sheriff's sales were made upon a certified copy of the judgment and decree of said Hamilton Circuit Court which judgment and decree was thereafter set aside and vacated by this court on the 5th day of October, 1915 (185 Ind. 172); that in county lands cleared of the cloud placed thereon by said sales; that said action was begun by these appellants, as said plaintiffs, filing their complaint in the office of the clerk of said Marion Circuit Court and causing summons to issue thereon for the defendants named; that said complaint was filed on to-wit, the 26th day of May, 1915; that Charles E. Cox, Esq., at present one of the attorneys in this cause of said Fidelity Trust Company was a judge of the Supreme Court of Indiana, at the time said opinion and judgment of this Court was rendered on the 5th day of October, 1915; reversing said judgment and decree of said Hamilton Circuit Court, and apparently he participated in the rendition of said judgment of this Court and concurred therein; that when he retired from membership in this Court said Cox appeared as attorney and counsel for appellee the Fidelity Trust Company in the matters in controversy in this suit affecting this trust and he with another, filed in said cause 25260 in said Marion Circuit Court the cross-

complaint of said Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, and caused summons to be issued on said cross-complaint for said Dora E. Rooker and William V. Rooker; that said cross-complaint was on the theory that said cross-complainants had been continuous and faithful in the performance of their duties in the administration of said trust and that they had faithfully performed said duties; that said Dora E. Rooker and William V. Rooker had by their said trust deed conveyed all their interest in said trust estate; that said Dora E. Rooker and William V. Rooker were wrongfully and unlawfully meddling with said property and were interfering with and preventing said defendants from performing the duties required in the administration of said trust; that said Dora E. Rooker and William V. Rooker should be adjudged to have no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that throughout said proceedings said Cox had appeared in his individual name and not in the name of his firm, Woollen, Cox & Welliver, of which firm Mr. Evans Woollen is and for many years last past has been president of the Fletcher Savings and Trust Company, one of the oldest and one of the largest trust companies in Indiana; that said Ewbank, as said judge of said Marion Circuit Court, found against these appellants as plaintiffs in said cause, and he sustained said cross-complaint on the trial of said cause and rendered judgment accordingly, including that these appellants there present as plaintiffs in said complaint and as defendants in said cross-complaint had no interest in said trust property, and that they should be restrained and enjoined from asserting any interest therein; that said judgment was given and rendered by said Ewbank on the 5th day of February, 1918, and he fixed the penalty

of the appeal bond therein at five thousand dollars, which these appellants were unable to give because their property was in the hands of said trustee; that on the 29th day of May, 1918, these appellants, as said plaintiffs, filed in the office of the clerk of this court their certified copy of the record proceedings and judgment of said Marion Circuit Court in said Cause No. 25260, together with assignments of error thereon, and caused notice to be issued thereon; that said cause was docketed in this court as Cause No. 23477, but was afterwards transferred to the docket of the Appellate Court of Indiana as Cause No. 10444, where the same is pending for decision; questions at issue in said Cause No. 25260 and determined by said Ewbank and carried into the record in this cause by the introduction in evidence in this cause of said judgment in said Marion Circuit Court in said Cause No. 25260, embody issues involved in this appeal, all to the effect that said Ewbank in sitting as a judge in this cause in this court is required to pass upon his own errors while sitting as a judge in said Cause No. 25260 in said Marion Circuit Court; that said action of said Ewbank in sitting in the determination of this court is beyond the precedents and traditions of this court; that appellants knew that said Ewbank sat with the other members of this court at the oral argument of this cause, but appellants then believed, as they lawfully might do, that he came upon the bench without information as to the nature and issues of this cause, and that he would recuse himself and not participate further when he became informed; but appellants say that the memorandum of the opinion of this court filed in the office of its clerk in this cause, contains no notation that said Ewbank did not sit and that the text of the said opinion as published in the advance sheets of the Northeastern Reporter does not disclose that said Ewbank did not sit; that it is a custom and usage, and may be said to be a rule of this court,

to note on the memorandum of opinions and judgment where a judge does not participate in the decision of a cause, and, knowing these things and upon the information they impart and believing them to be true, appellants say that Judge Ewbank sat in the determination of this cause while he was incompetent and disqualified to sit.

"2. And as to the further interest of Judge Louis B. Ewbank in the matters and things involved in this cause and the precedents to be established thereby to the benefit and advantage of trustees, appellants say that in and by the last will and testament of one Volney T. Malott, late of said Marion county, the said Louis B. Ewbank was nominated and appointed co-executor and co-trustee of the estate of said Malott, valued at many millions of dollars, and embracing holdings of stock in banks and trust companies, competent under the law to accept and execute trusts of the kind and character of the trust involved in this suit; that among said holdings of stock in banks and trust companies by said Ewbank and his co-executors and co-trustees are First National Bank, Brazil, Indiana, stock valued at $30,000.00; Indiana National Bank, Indianapolis, Indiana, stock valued at $662,500.00; Union Trust Company, Indianapolis, Indiana, stock valued at $65,000.00; that it would be greatly beneficial to said banks and trust companies and enhance the value of the stock of said banks and trust companies to have the law established as being that trustees were not liable for the mal-administration of their trusts nor for the waste and conversion of their trust estate, and that a trustee could not be held to respond to the complaint of a *cestui que trust* that the trustee was guilty of mal-administration of a trust and waste and conversion of the trust estate, and that there was no party in interest competent to invoke the jurisdiction of a court to command a trustee to fidelity in the administration of a

trust, nor to invoke the jurisdiction of a court to determine that a trust agreement, of the nature and kind affected by this suit, could be adjudged to have been repudiated by the trustee and thereupon rescinded by the parties aggrieved, nor to invoke the jurisdiction of a court to remove a trustee who was at fault and to sequester the trust estate by the appointment of a receiver therefor to the end that the trust estate could be administered for the benefit of all the parties in interest and not solely for the benefit of the trustee; that said Volney T. Malott departed this life June 14, 1921, at said Marion county; that at the time of his death he was more than eighty years of age; that on the 8th day of March, 1916, said Malott, knowing his advanced years and comprehending the near approach of his death in the usual processes of nature, executed his said will, wherein he nominated the said Louis B. Ewbank, together with Thomas H. Kaylor and John Malott Fletcher, co-executors of his said will, with the right of survivorship and in and by said will he appointed said Ewbank, Kaylor and Fletcher co-trustees of his estate, with the right of survivorship, said trusteeship to become effective when the statutory period had expired for the administration of said estate and the final settlement thereof, usually a minimum of thirteen months after the issuance of letters, and said trusteeship was thereafter to continue in said Ewbank, Kaylor and Fletcher, and in the survivor of them, until the second day of March, 1944, an approximate period of twenty-three years, when said trust was to be closed and the proceeds thereof distributed as provided in said will, said trustees to take credit for their charge, including certain annual charges payable out of the income of said estate; that said Kaylor and Fletcher are bank clerks and said Ewbank is the only lawyer among said co-executors and said co-trustees; that these appellants are informed and believe, and upon information

and belief state the fact to be, that said Ewbank knew of his appointment as said executor and trustee and of the interests, duties, rights, powers, opportunities and all the circumstances thereof, when the same was made, and that he had such knowledge on the 5th day of February, 1918, when as circuit judge he heard and determined said Cause No. 25260 in said Marion Circuit Court; that these appellants did not have, nor did either of them have, any knowledge whatsoever as to the said will of said Malott nor as to any provision thereof, nor as to the appointment of said Ewbank as such co-executor and co-trustee until after said will was probated in the Probate Court of said Marion county on the 20th day of June, 1921, when the provisions of said will were set forth in the daily newspapers and those publications imparted to these appellants, and to each of them, the first information and the first means of information, they, and each of them, had as to said last will and testament and as to any of its provisions, and that said Ewbank had any of the interests, duties, rights, powers, opportunities and purposes which he now has, holds, entertains and enjoys; that upon the probate of said last will and testament said Ewbank duly accepted said trust and qualified and is now a duly incumbant co-executor of said will, and he intends to and will perform the office of said trust until the time arrives when he should qualify as co-trustee of said estate, valued at many millions of dollars, under said will; that he intends to, and then will, assume the office of said co-trustee and qualify as such; that prior to the decision of this cause by the Supreme Court of Indiana, it always had been the law of this state that the maxim prevailed, *nemo debit esse judex in propria sua causa*—no one ought to be a judge in his own cause—and that judicial proceedings were void where the judge who made the ruling had an interest which might affect him in the performance of his duty

in the premises; that upon the premises the said judgment of said Marion Circuit Court in said Cause No. 25260 was unlawful and void and its introduction in evidence on the trial of this cause was unlawful and the participation of said Ewbank in the consideration of this cause was unlawful and denies to these appellants and to each of them due process of law and the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

"Fourth: The opinion and judgment of the Supreme Court of Indiana wrongfully and unlawfully burdens, obstructs and defeats the rights of these appellants to present for consideration the federal questions, and each of them, that said opinion and judgment impairs the obligations of plaintiffs' said trust contracts of October 11, 1909, in contravention of Art. I, Sec. 10, of the Constitution of the United States, and that said opinion and judgment deprive these appellants, and each of them, of property without due process of law, and deny to these appellants, and each of them, the equal protection of the laws, all in contravention of the Fourteenth Amendment of the Constitution of the United States; that said opinion and judgment do so burden, obstruct and defeat the said rights of these appellants, and each of them to present said federal questions, and each of them, by (1) wrongfully and unlawfully adding to the terms and conditions imposed by the Supreme Court of the United States upon which a federal question may be raised and presented, certain alleged rules, interpretations and dicta, and (2) by erroneously, wrongfully and unlawfully construing and applying said alleged rules, interpretations and dicta as applied to this case and all in the form and manner and to the effect following, that is to say: In appellants' original brief on the merits filed in the Supreme Court of Indiana in this cause, on

towit, the 15th day of December, 1919, the following appears, beginning on page 286, towit:

"PROPOSITION B. SECOND ERROR.

"The judgment of the trial court denies to the trust estate due process of law and takes the property of the trust estate, without the equal protection of the law, and impairs the obligation of the trust contract.

Printed Tr., p. 513.

POINT 1.

"Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, 'What constitutes due process of law?' arises as often when judicial action is in question as in any other cases. * * * The proceedings in any court are void if it wants jurisdiction of the cause in which it has assumed to act. Jurisdiction is, *first*, of the subject matter; and, *second*, of the persons whose rights are passed upon.'

Cooley's Const. Lim., 6th Ed., p. 491;
Windsor v. McVeigh, 93 U. S. 274, 277;
Pennoyer v. Neff, 95 U. S. 714;
Huling v. Kaw Valley Ry., 130 U. S. 564;
Scott v. McNeal, 154 U. S. 34, 46;
New Orleans Water Works v. New Orleans, 164 U. S. 471, 480.

Printed Tr., p. 518.

POINT 2.

"In this case there is no personal judgment against these appellants, but there is against them a judgment *in rem* quieting title, etc. There is a judgment *in rem* defining the nature of the appellees' interest in the trust state and quieting title, etc. There is a judgment *in rem* defining the nature of the appellees' interest in the trust state and stating the value thereof to be $50,697.50.

Printed Tr., pp. 213-4.

POINT 3.

"On the complaint, the court found against the appellants as plaintiffs and that they had no right to maintain this, their action. And judgment was rendered accordingly. The judgment against the appellants as plaintiffs included an injunction against the plaintiffs, including these words, viz: 'It is further considered, adjudged and decreed by the court that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deed of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and to the right of possession thereof and the use, rents and profits thereof, and have no interest therein other than in such proceeds of sale thereof as may remain to be distributed to said Dora E. Rooker under this judgment and said trust agreement; that any other interest in or control over said lands than such interest in the proceeds aforesaid, heretofore and now being asserted by said plaintiffs adverse to the title of said trustee is wrongful, without right and unfounded and an obstruction of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are hereby each and both perpetually enjoined from denying or disputing the said title of said Fidelity Trust Company as trustee, to said lands above described and its right to the possession, use, rents and profits thereof and from denying or disputing the said title of said Fidelity Trust Company as trustee, to said lands above described and its right to the possession, use, rents and profits thereof and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale conferred by said deeds and trust agreement and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any pur-

chaser or purchasers in giving possession or taking possession when sale shall have been made as aforesaid.

Printed Tr., p. 519.

POINT 4.

"The judgment of the court in the particular noted under Point 1 *supra* was the mere consummation of a wrong theory adopted by the trial court at the beginning, viz: That these appellants had no interest whatsoever in the premises and were therefore *incompetent to produce any issue upon which the appellees were obliged to respond.*

Printed Tr., pp. 519-20.

POINT 5.

"The issues tendered by the cross-complaint were not brought into the record as by answer or counter claim upon summons directed by the plaintiffs to the defendants. On the contrary, the cross-complainants adopted and pursued the trial court theory that their right of recovery was on a distinct action which required a writ of summons to issue in their behalf. This writ of summons was directed not against the nominal trustee nor against any person so representing the trust estate. The entry follows, viz: 'And the court now orders the clerk of this court to issue summons on said cross complaint to said Dora E. Rooker and William V. Rooker, said summons to be returnable on the 7th day of April, 1913.'

Printed Tr., p. 520.

POINT 6.

"Appellees are bound by their trial court theory that appellants were incompetent to bring and did not bring the trust estate into court. Having asked and got judgment on that theory they are concluded thereby. Appellees' conduct in the premises was an election of

remedies. The election of remedies is held to be conclusive, and it applies to pleadings and procedure in courts.

John v. Greist, 85 Ind. 503;
Mescall v. Tully, 91 Ind. 96;
Dawson v. Shirk, 102 Ind. 184, 188;
Chicago, etc., Co. v. Bills, 104 Ind. 13;
Ikerd v. Beavers, 106 Ind. 580, 588;
Green v. Grooves, 109 Ind. 519;
Carr v. Haskett, 110 Ind. 152, 155;
Baker v. Ludlam, 118 Ind. 87;
Aetna, etc., co. v. Hildebrand, 137 Ind. 462;
State v. Scott, 171 Ind. 349;
Elliott's Gen. Prac., Secs. 945, 1013;
5 Lawson's Rights, Rem. and Pr. Sec. 2498.
Printed Tr., p. 520.

POINT 7.

"The nominal trustee joined with its creditor, the Fidelity Trust Company in its corporate capacity proper, as co-plaintiff in a cross-complaint to enforce a claim of the creditor against the trust estate in a cause where the trust estate was not sued; where the trust estate was without notice issued to it or served upon it as to the cross-complaint on which recovery was held. The nominal trustee could not sue itself and it did not defend itself in its own action, nor the trust estate. The trustee is a judgment plaintiff here in a judgment *in rem* against the trust estate on issues tendered against the trust estate by the nominal trustee and as to which issues the trust estate never was sued. The judgment is void. Vide authorities *supra*.

I Burns R. S. 1914, Sec. 252;
Mitchell v. St. Marys, et al., 148 Ind. 111, 115;
Marion Bond Co. v. Mexican, etc., Co., 160 Ind. 558, 563.
Printed Tr., p. 520.

POINT 8.

"Denial of due process of law and denial of the equal protection of the law may arise upon a judicial record as it may arise otherwise. In the instant case it arises upon a judicial record. The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state whether through its legislative, its executive or its judicial authorities.

Scott v. McNeal, 154 U. S., 34-45; 38 Law Ed. 896, 901;

Forsyth v. Hammond, 142 Ind. 519; 30 L. R. A. 583.

Printed Tr., p. 521.

POINT 9.

"It was a denial of due process, and it was a denial of the equal protection of the law, and it was the impairment of the obligation of a contract for the trial court, without the trust estate having been sued and without any issue being tendered to that effect, to reform the trust deed so as to take from appellants the rights which they had never parted with and which they had never granted away, viz:

"A. The power coupled with an interest in their behalf to protect in any lawful manner the trust estate as they had created it.

"B. The power coupled with an interest in their behalf to protect the trust as they had created it, and which embraced the power retained in them as grantors to appoint a new trustee for cause; and limited any power of appointment by the court to the appointment of a receiver who should sequester the trust

estate and hold it *in custodia legis* while the court was engaged in determining the rights of the parties under the trust agreement at the time the litigation began.

"C. The power coupled with an interest in their behalf to protect the right of possession and the uses of the rents and profits of the trust estate pending the progressive execution of the trust.

"D. The power coupled with an interest in their behalf to enforce the obligation that time was of the essence of the trust agreements.

"E. The power coupled with an interest in their behalf to enforce the obligation of the trustee to do and perform as in the trust agreement provided for, and as the consideration for the trust agreement.

"F. The power coupled with an interest in their behalf to enforce the obligation of the trustee to engage its fidelity to the performance of the trust.

"G. The power coupled with an interest in their behalf to enforce the obligation of the trustee as a contractual consideration for the mutual covenants of the trust contract that the trust, with fidelity on the part of the trustee should be performed in the time, form and manner and up .n the terms particularly stipulated and set forth in the memoranda creating the trust.

Printed Tr., pp. 521-2.

POINT 10.

"The court could no more take these vested rights from the grantors of the trust without a lawful and proper issue to reform for lawful and proper grounds the trust agreement, and without the trust being in court, than the legislature could have taken them upon its mere *ipse dixit* in the form of a pretended statute.

McClelland v. Coffin, 93 Ind. 463;

Conant v. National Bank, 121 Ind. 323;

Perkins v. Haywood, 124 Ind. 445, 450, 451;

Reynolds v. Louisville Etc., R. Co., 143 Ind. 579, 614-634;
Stenzel v. Boyce, 143 Ind. 642, 646;
Lowe v. Turpie, 147 Ind. 652;
Harrison, Etc., Assn. v. Lackey, 149 Ind. 10, 14;
Indianapolis, Etc., R. Co. v. Houlehan, 157 Ind. 494, 506;
Stewart v. Knight, Etc., Co., 166 Ind. 498;
Huber Mfg. Co. v. Wagner, 167 Ind. 98;
Harrison Tp. v. Addison, 176 Ind. 386, 396.
Printed Tr., p. 522.

POINT 11.

"Testing the case by the principle 'that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts and under circumstances repelling all presumptions of fraud, imposition or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is were the appellants entitled to relief? To which we respond decidedly in the negative.' Mr. Justice Catron in *Bank, Etc., vs. Daniels*, 12 Pet. 32, 56; I. Ed. 989, 998.

Upton v. Tribilcock, 91 U. S. 50, 23 Law Ed. 206;
Lamborn v. County Commissioners, 97 U. S. 181, 185; 24 Law Ed. 926-929;
Bond v. Coats, 16 Ind. 203;
Oiler v. Gard, 23 Ind. 212, 219;
Town of Ligonier v. Ackerman, 44 Ind. 552, 568-578;
Bennett v. Ford, 47 Ind. 264-269;
Hines v. Board, 93 Ind. 266;
Parker v. Bank, 59 Ind. App. 189, 192-4.
Printed Tr. p. 522.

POINT 12.

"The *cestui que trust* may bring a bill or petition for removal, and the court may remove the trustees from office and appoint others in their place when there has been bad conduct, or the trustee is unfit for his office, or to prevent a threatened breach of the trust or any danger to the trust fund."

Perry on Trusts, 5th Ed., Sec. 817.
Printed Tr., p. 522.

POINT 13.

"Proceedings for the removal of trustees and the appointment of others require some time, as trustees have the right to file answers to the charge against them and to regular and full hearing; and as the *cestui que trust* are entitled to have the fund properly protected and managed in the meantime, the court may appoint receivers."

Perry on Trusts, 5th Ed., Sec. 818.
Printed Tr., p. 523.

POINT 14.

"The *cestui que trust* is entitled to enforce the trust, not only against the trustee, but also against those who, with notice, wrongfully claim under the trustee.

Perry on Trusts, 5th Ed., Sec. 821, 822;
Zimmerman v. Makepeace, 152 Ind. 199.
Printed Tr., p. 523.

POINT 15.

"The powers of trustees under deeds of trust, and of mortgagees under mortgages with power of sale, depend entirely upon the terms of the deeds. Such powers are created by, and exist in the deeds, and of course they exist in the terms in which they are created and in no others. They are to be exercised by the trustees *in pais*. They are wholly matters of convention

and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. Statutes in some states have regulated their execution, but such statutes do not create the powers themselves."

Perry on Trusts, 5th Ed. sec. 602g.
Printed Tr., p. 523.

POINT 16.

In the consideration of a court of equity the *cestui que trust* is actually seized of the freehold.

Croxall vs. Sherard, 5 Wall 268; 18 Law Ed. 572.
Printed Tr., p. 523.

PROPOSITION C, SECOND ERROR.

The appellees are in the dilemma of one who occupies a double position. (1) If their second amended counter claim is to be read as an answer it is to be read in the light of the complaint in which event all those items go out of the case which represent events following the filing of the complaint on October 30, 1912, the complaint reposing on the trust agreement and its repudiation by the trustee. (2) If their second amended counter claim is to be read not as an answer but as a cross-ocmplaint, then the trust estate is not in court because the trustee could not sue itself on its own cause of action.

"To sustain this proposition we offer the following points, viz:

Printed Tr., pp. 523-4.

POINT 1.

"Nor can it be said that the payments made after the election of the trustee to repudiate the trust were made under duress because (1) there is no issue to

that effect in this record and (2) because the duress, if any, could be confined only to the fear of tax sale or foreclosure of prior mortgages. The act of repudiation would estop the appellee from making such defense of payment under duress (1) it was the duty of the trustee to protect the entire trust and not merely the trustee's interest therein and (2) it would be a wrongful and unlawful severance of the trustee's duties to the trust to admit that the trustee might make the payments to protect its own interests in the trust estate and at the same time abandon the protection of the interests of the *cestui que trust* against tax sales or foreclosure. Unless payments were made to protect all the interests of everybody affected by the trust, the payments would be not only voluntary but wrongful. It is wrongful for a trustee to abandon the interests of *cestuis que trust*. The record shows that after the act of repudiation on October 28, 1912, the appellees set about to acquire title to the entire trust estate as upon foreclosure. It is the law of this case as settled by the former opinion of this court, that those foreclosure proceedings were wrongful and unlawful. While that wrongful and unlawful conduct was being pursued by the appellees they claim to have made the certain payments including the purchase of the American Central, etc., mortgage. Upon the acquisition of that mortgage the Fidelity Trust Company at once proceeded to foreclose that mortgage and to that effect filed its complaint on May 15, 1914, against these appellants, who were *cestuis que trust* in the trust agreement. Voluntary payments cannot be recovered back.

Printed Tr., p. 524.

POINT 2.

"One who acts in aid of his own wrong not only denies himself the right to recover voluntary payments he made in advancing his unlawful purposes, but also

being a wrong doer, he fails to come into equity with clean hands and cannot enforce therefore subrogation nor sue in the right of one whose interest the wrong-doer acquired.

Wilkinson v. Babbitt, 4 Dillon C. C. 207; 29 Fed. Cas. 17, 668.
Printed Tr., p. 524.

POINT 3.

"Was it ever known that a fraudulent purchaser of property, when deprived of its possession could recover for his repairs or improvements or for incumbrances lifted by him whilst in possession? If such a case can be found in the books we have not been referred to it. Whatever a man does to benefit an estate under such circumstances, he does in his own wrong. He cannot get relief by coming into equity."

Railroad Co. v. Souter, 13 Wall 517, 523.
Printed Tr., p. 524.

POINT 4.

"It is settled as the law of this case that the appellees' foreclosure of the trust deed as a mortgage was wrongful and unlawful; the title acquired under the decree of foreclosure was consequently wrongful and unlawful; every step taken and every act done in aid of the wrongful repudiation and foreclosure was *ultra vires* the trust and was wrongful and unlawful.

Rooker v. Fidelity Trust Co., 185 Ind. 172.
Printed Tr., p. 525.

POINT 5.

"The doctrine of subrogation applies only to lawful and meritorious transactions. It is a doctrine which prevails only in equity; and it would be absurd to say if the transaction were illegal and void, and could not be upheld for that reason, that these mortgages, which,

if paid for at all by the company, were based upon such illegal transactions * * * could be enforced by them."

Farmers Loan, etc., Co. v. Carroll, 5 Barb. 613, 660.

Printed Tr., p. 525.

POINT 6.

"The law cares very little what a fraudulent party's losses may be and cares nothing for his sake."

Guckenheimer v. Angevine, 81 N. Y. 294.

Printed Tr., p. 525.

POINT 7.

"If Titus write an oration or a poem on a parchment which he obtained wrongfully, the oration or the poem will go with the parchment, even though written by Titus."

Justinian, De Scripta.

Printed Tr., p. 525.

POINT 8.

"Our law, like the Roman law, treats those who expend money or labor upon property wrongfully taken by them, as volunteer servants of the owner. So far the authorities, both English and American, seem to be harmonious, and in accord with the civil law. Year Book, 5 Hen. VII, Folio 15; 2 Bl. Com. 404; 2 Kent. Com. 363; Betts v. Lee, 5 Johns, 348; Baker v. Wheeler, 8 Wend. 505; Silsbury v. McCoon, 3 N. Y. 370; Guckenheimer v. Angevine, 81 N. Y. 397."

Baker v. Hart, 52 Hun. 365.

Printed Tr., p. 525.

POINT 9.

"To a party whose title originated in fraud or other-

wise wrongfully, no compensation for improvements and the discharge of incumbrances, ever is allowed.

Morrison v. Robinson, 31 Pa. 456;
Van Horne v. Fonds, 5 Johns Ch. 388, 416;
Russell v. Blake, 2 Pick, 505;
McKim v. Moody, 1 Rand. (Va.) 58;
Morris v. Terrill, 2 Rand. (Va.) 6.
Printed Tr., p. 525.

POINT 10.

"There is no case 'decided in England, Ireland or the United States, grounded upon common law principles, declaring an occupant of land, without a special contract, is entitled to payment for his improvements as against the true owners, when the latter have not been guilty of fraud in concealing the title.'

Heron, Hist. Jurisprudence p. 715.
Printed Tr., p. 526.

POINT 11.

"Certainly the appellants, unless they did so as forced trustee, and in their right as *cestuis que trust*, did not bring the trust estate into court in this suit because, on the appellees' final trial Court theory, which they procured the trial Court to adopt, the appellants were by the judgment of the Court held to be without an interest and were enjoined from asserting an interest. Certainly the nominal trustee joining with its creditor did not bring the trust estate into Court in this cause because the nominal trustee could not sue itself. Upon the record and judgment therefore we have the trust estate, in its absence from Court mulcted in a large sum which upon the authorities *supra* was composed of unlawful claims on the part of the nominal trustee and its co-appellee and counter claimant.

Printed Tr., p. 526.

PROPOSITION D, SECOND ERROR.

"The Act of March 15, 1913 (Acts 1913, p. 850) as amended by the Act of March 5, 1915 (Acts 1915, p. 123), 1 Burns R. S. 343 A, impairs the obligation of contracts by permitting the pleader to substitute for the terms of the contract his own conclusions as to the terms of the contract and the statute forces a joinder of issue for the purposes of trial upon the pleader's conclusions rather than upon the terms of the contract.

Printed Tr., p. 526.

To sustain Proposition D, we offer the following points, viz:

POINT 1.

"The obligation of a contract includes both the specific terms of the contract and the laws which attend them and as thus constituted the obligation of a contract, is guaranteed by the constitution of the United States, which is the supreme law of the land.

Art. I, Sec. 10, Const. U. S.;
Art. VI, Const. U. S.
Printed Tr., p. 526.

POINT 2.

"To guarantee the correct and judicial interpretation the obligation of the contract, which is the basis of this action, the constitution of the state clothed the contract with the right of 'due process of law' and the legislature made it imperative that the affected contract should be produced in Court and exhibited with the pleadings.

Art. I, Sec. 12, Const. Ind.
L. Burns R. S. 368.
Printed Tr., p. 526.

POINT 3.

"A contract exhibited with a pleading should control the averments of the pleading.

Harrison Co. v. Lackey, 149 Ind. 10.
Stewart v. Knight & Jillson Co., 166 Ind. 498;
Huber Mfg. Co. v. Wagner, 167 Ind. 98.
Printed Tr., p. 527.

POINT 4.

"Parol evidence should not be admitted to vary the terms of a written instrument.

Rooker v. Fidelity Trust Co., 185 Ind. 172.
Printed Tr., p. 527.

POINT 5.

"Where an exhibit is contained in a special finding, the exhibit should control the terms of the special finding and the judgment should follow the findings.

1 Burns R. S. 577.
Smith v. Brand, 64 Ind. 427, 430;
Buchanan v. Berkshire, etc., Co., 96 Ind. 535;
Conant v. Bank, 121 Ind. 323;
Indianapolis, etc. Co., v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville, etc. R. Co., 143 Ind. 579, 614-634.
Lowe v. Turpie, 157 Ind. 652.
Printed Tr., p. 527.

POINT 6.

"In an action on a contract the pleading should disclose a breach of the contract whereby the party asserting the right was aggrieved, because the Courts are only open that 'every man, for injury done him in his

person, property or reputation shall have remedy by due course of law.

Const. Ind. Art. I, Sec. 12.

Gallup . Schmidt, 154 Ind. 196, 202.

Printed Tr., p. 527.

POINT 7.

"The Act of March 15, 1913 (Acts 1913, p. 850) as amended by the Act of March 5, 1915 (Acts 1915, p. 123; 1 Burns R. S. 343 A) specifically authorizes conclusions to be pleaded in the place and stead of facts, and requires issues to be joined on such conclusions. Nor it is a cure of the evil in the law that the statute make it possible to require the complaint to be made more specific, etc., because the right of the pleader to set forth conclusions authorizes the Court to exercise a discretion in respect of those conclusions which may be in contravention of the contract. In the instant case the appellees' joint cross-complaint pleaded the false conclusions that upon the facts stated, which included an exhibit of the trust contract, there had been performances by appellees, default by appellants and therefore that there was a cause of action in the appellees. These false conclusions of the pleader stood despite motions to strike out to make more certain and specific; also demurrers. These false conclusions of the pleader entered in to the special findings as a fact and they stood, notwithstanding the presence of the trust agreement, despite motions of appellants for judgment in their favor on the special findings. These false conclusions of the pleader entered into the conclusions of law and they stood despite the exceptions of these appellants, as plaintiffs, to the conclusions of law. These false conclusions of the pleader entered into the judgment and they stood despite the motions to modify the judgment. These false conclusions of the pleader became finally conclusive of the rights of

the parties despite the motions of appellants, as plaintiffs, for a new trial of the cause. The fatal vice of the statute is that it removes the obligation from the terms of the contract and plants it in the judicial discretion despite the principle that courts do not create contracts but only enforce them. The statute therefore imposes on appellants as a vital element of this appeal, the duty to determine the accuracy of the Court's action in respect of the conclusions pleaded, rather than the accuracy of the Court's action in respect of the terms of the affected contracts.

McClellan v. Coffin, 92 Ind. 463.
Naltner v. Tappy, 55 Ind. 107.
Stewart v. Knight, etc. Co., 167 Ind. 98.
Conant v Bank, 121 Ind. 323.
Indianapolis, Etc., R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. Co., 143 Ind. 579, 514-634.
Stenzel v. Boyce, 143 Ind. 642, 646.
Harrison Building etc. Co. v. Lackey, 149 Ind. 10, 14.
Lowe v. Turpie, 147 Ind. 652.
Globe etc. Co. v. Reid, 19 Ind. App. 203, 212.
Perkins v. Hayward, 124 Ind. 445, 450-451.
Harrison Tp. v. Addison, 176 Ind. 386, 396.
Printed Tr., pp. 527-8.

POINT 8.

"After the appellees elected to stand upon the exhibits pleaded, as they did stand, unless the countervailing statute could and did substitute the pleader's conclusions in the place and stead of the obligation of the contract, then no evidence should have been admissable which would change, alter or vary the terms of the instruments pleaded, and by those instruments the

appellees must now stand or fall unless the statute defeats the contracts.

Conant v. Bank, 121 Ind. 323.
Indianapolis etc. R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. R. Co., 143 Ind. 579, 614-634.
Rooker v. Fidelity Trust Co., 182 Ind. 175.
Printed Tr., p. 528.

POINT 9.

"The findings of maturity, default and the right of judgment are not sustained by the instruments pleaded and therefore should be disregarded as being outside of the issues, unless conclusions of the pleader are, by the terms of the statute, made to displace the terms of the contract. In the event the conclusions of the pleader displaced the terms of the contract then we were to try the cause on the issue of what the pleader said the contract was rather than on the issue of what the contract by its own terms declared itself to be according to the fixed rules of judicial interpretation and construction.

Cruzan v. Smith, 41 Ind. 288, 295.
Boardman v. Griffin, 52 Ind. 101.
Naltner v. Tappy, 55 Ind. 108.
Thomas v. Dale, 86 Ind. 435.
Brown v. Will, 103 Ind. 71.
Willis v. Crowder, 134 Ind. 515.
Citizens Bank v. Judy, 146 Ind. 322.
Lowe v. Turpie, 147 Ind. 652.
Reynolds v. Louisville, etc. Co., 143 Ind. 576, 621.
Harrison etc. Co. v. Lackey, 149 Ind. 10, 14.
Talbott v. English, 156 Ind. 299, 315.
Indianapolis etc. R. Co. v. Houlihan, 157 Ind. 494, 506.

Stewart v. Knight etc. Co., 166 Ind. 498.
Huber Mfg. Co. v. Wagner, 167 Ind. 98.
Printed Tr., p. 529.

POINT 10.

"As the case stood the appellants had executed with the Fidelity Trust Company, as trustee, the trust agreement. The terms of the agreement were its consideration. The agreement was by its terms to be preformed *in pais*. There was no obligation imposed on the appellants, but they had rights which commanded protection. Having no obligation to perform the appellees had no obligation which they could default. Having no capacity for default the appellants were without capacity because of default, to create the maturity of any obligation on their part to be performed or to create any right in the appellees. Because of this situation the appellees directed their various motions and demurrers to the counter claim. These motions and demurrers had elements of similarity. But the court accepted what the appellees said about the trust agreement rather than what the trust agreement said about itself; and thus the cause came to be tried upon the conclusions of the pleader rather than upon the terms of the contract as given in its own words.

Printed Tr., p. 529.

POINT 11.

"A case tried upon a complaint which does not state a cause of action cannot result in a special finding which will be sufficient, because a special finding can be no broader than the complaint under the familiar rule that a special finding must be within the issues.

Davis v. Franklin, 25 Ind. 407, 408.
Kealing v. Vansickle, 74 Ind. 529, 535.
Perkins v. Hayward, 124 Ind. 445, 450-1.
Durflinger v. Baker, 149 Ind. 375, 378.

Talbott v. English, 156 Ind. 299, 315.
Cook v. Board, 175 Ind. 215, 224.
Harrison Tp. v. Addison, 176 Ind. 286, 396.
Printed Tr., p. 530.

POINT 12.

"After the appellee elected to stand upon the exhibits pleaded, and it was an election so to stand when the appellee prevailed upon the court to overrule the appellants' demurrers and motions to make more specific, etc., then no evidence should nor would be admissible which would change, alter or vary the instruments pleaded, and by those instruments the appellee must now stand or fall, unless the statute (1 Burns R. S. 343) prevails to allow the obligation of the contract which is its consideration, to be impaired by the judicial imposition of 'conclusions' to which as terms of the contract the affected parties never have given their consent.

Conant v. Bank, 121 Ind. 323.
Indianapolis R. Co. v. Houlihan, 157 Ind. 494, 506.
Reynolds v. Louisville etc. R. Co., 143 Ind. 579, 614-34.
Printed Tr., p. 530.

POINT 13.

"The instruments at issue are set out *ipsissimus verbis* in the special findings and they should have controlled it as they should have and would have controlled the counter claim, except as the statute (1 Burns R. S. 343 A) impaired the obligation of the contract by destroying its consideration. The obligations of a contract, within the meaning of the constitutional provision against impairment, depends upon its terms and the means which the law in existence at the time affords for its enforcement. Validity and remedy are

both parts of the obligation and are guaranteed by the constitution against impairment. When the court in this case, adopting the conclusions of the pleader pursuing the statute (1 Burns R. S. 343 A), held that the appellants were without right to enforce the performance of the trust agreement, then and there the court held that there was no person competent and qualified to enforce the performance of the contract. This constituted impairment and the statute *supra* which pretended to authorize such procedure fell within the inhibition of the constitution.

McCracken v. Hayward, 2 How. 608; 11 Law Ed. 397.

Walker v. Whitehead, 16 Wall, 314; 21 Law Ed. 357.

Murray v. Charleston, 96 U. S. 432; 24 Law Ed. 760.

Printed Tr., pp. 530-1.

POINT 14.

"The independence of the judiciary from legislative control in the matter of interpretation comprises a part of the obligation of a contract. While it may be admitted that the legislature may prescribe statutory definitions for the purpose of a statutory right—for example the legislature may define a statutory mechanic's lien—but the legislature, nevertheless, is without power to tell the judiciary the meaning of the words in a contract, and, likewise, the legislature is without power to authorize any other person to tell the judiciary the meaning of words. To illustrate the many bearings which this principle affecting the independence of the jury has in the instant case the statute authorized the pleader to state as a conclusion binding on the court that the appellee had performed 'all conditions of said contracts on its part to be performed' (Printed Tr., p. 531); also, 'That said cross-complain-

ant has fully and duly performed all of the conditions on its part to be by it performed.'

Printed Tr., p. 531.

POINT 15.

"If the legislature can require courts to accept a pleader's conclusions in lieu of facts, then the legislature can require courts to give an effect to contracts which will defeat the intentions of the parties who made the contracts. If the legislature can require the courts to defeat the expressed intention of the parties to a contract, then the legislature can require courts to change and modify contracts. If the legislature can require courts to change and modify contracts, then the legislature can require the courts to deny altogether the right to contract. The inviolability of contract clauses of the constitution restrains such power in the legislature.

McClelland v. Coffin, 93 Ind. 465.

Printed Tr., p. 531.

POINT 16.

"The trend of the law is to allow the utmost liberty in contracting. It repeatedly has been held that parties may stipulate that the laws of a state or country other than the one wherein the contract is made, shall govern its interpretation and remedy both as to the rights and duties of the parties on the one hand and as to their remedies in case of a breach on the other hand. The law of the contract is a part of its obligation.

McAllister v. Smith, 17 Ill. 328, 334.

Union Nat'l Bank v. Chapman, 169 N. Y. 538, 545.

Grand v. Livingston, 4 App. Div. 589, 593, 596, affirmed 158 N. Y. 688.

Dike v. Erie Ry. Co., 41 N. Y. 113, 116.

Le Breton v. Niles, 8 Paige 261.
Green v. Poole, I. R. 5, Q. B. D. 272.
Cohen's Commercial Arbitration and the Law 16, 217.
Liverpool etc. Co. v. Phoenix Ins. Co., 129 U. S. 397, 445; 32 Law Ed. 788, 798.
Cochlan v. So. Carolina R. Co., 142 U. S. 101; 35 Law Ed. 951, 954.
Pinney v. Nelson, 183 U. S. 146; 46 Law Ed. 125.
Printed Tr., p. 531-2.

POINT 17.

"Parties may by stipulation waive their right to appeal.

Townsend v. Masterson, 15 N. Y. 587.
Ogdenburgh etc. R. Co. v. V. etc. R. C., 63 N. Y. 176.
Godfrey v. Moser, 66 N. Y. 250.
Riggs v. C. etc. Inc. Co., 125 N. Y. 7; 10 L. R. A. 684; 21 Am. St. Rep. 716.
Palmer v. Lavers, 218 Mass. 286; 105 N. E. 1000.
Hoste v. Dalton, 137 Mich. 522.
Watson v. Wetter, 91 Pa. 385.
Printed Tr., p. 532.

POINT 18.

"There is strong authority for the legal proposition that parties may select the courts in which the case is to be tried in the event of controversy. Judge Parker in *La Greve v. Aetna etc. Co.*, 81 Hun. 28, 30, said: 'The suggestion that the court should resent this attempt to oust it of jurisdiction is unworthy of extended notice.'

Printed Tr., p. 532.

POINT 19.

"*Jessel, M. R. in Pointing etc. Co. v. Sampson*, I. R. 19 Eq. 462, 465, said: * * * If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.'

Printed Tr., p. 532.

POINT 20.

"Judge Earl *in re New York etc. R. Co.*, 98 N. Y. 447, 453, said: 'Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties which not only binds them, but which the courts are bound to enforce.'

Printed Tr., p. 532.

POINT 21.

"The parties to a contract may require the commencement of an action within a period shorter than prescribed by the statute of limitations.

Erie etc. R. Co. v. Stone, 98 N. Y. 447, 453.

Ames v. New York, etc., Ins. Co., 14 N. Y. 253, 262.

Ripley v. Aetna Ins. Co., 30 N. Y. 136, 163.

Roach v. New York etc. Co., 30 N. Y. 546.

Mayor etc. v. Hamilton etc. Co., 39 N. Y. 45.

William v. Fire Ass'n etc., (N. Y.) 119 App. Div. 573.

Riddlesbarger v. Hartford Ins. Co., 7 Wall 386 and cases cited.

Fullam v. New York, etc., Ins. Co., 7 Gray 61.

Printed Tr., p. 533.

POINT 22.

"The parties to a contract may limit their liability for negligence.

Anderson v. Erie R. Co., (N. Y.) 171 App. Div. 687.

Printed Tr., p. 533.

POINT 23.

"They may settle controversies on terms which do not affect a general release of liability.

Parry Mfg. Co. v. Crull, 56 Ind. App. 77.

Printed Tr., p. 533.

POINT 24.

"The parties to a contract may provide an exclusive form of remedy which the courts will enforce.

Hickman v. Sawyer, 216 Fed. 281 and cases cited.

Printed Tr., p. 533.

POINT 25.

"In the instant case the parties agreed upon a ritual of procedure. Mrs. Rooker was undertaking to liquidate her estate. Time was of the essence of the contract and the prescribed method was its consideration. Instead of performing the trust agreement the appellees devoted many years of earnest endeavor to acquiring, and they did acquire by proceedings adversely to the trust, the legal title to the trust property. All these principals of the trust agreement became the settled law of this case on the former appeal, and the facts appear uncontroverted in this record. Notwithstanding this situation the statute (1 Burns 343 A) allowed the appellees to destroy the law of the case, to destroy the obligations of the contract and to disregard the unlawful conduct *in pais* of the appellees, by their making the averment of a conclusion of full and

due performance, obligatory on the court to the exclusion of every fact and of every principle of jurisprudence, including the settled law of the case as fixed on the former appeal. This result, we contend, impaired the obligation of the contract.

Printed Tr., pp. 533-4.

POINT 26.

"The legislature can neither perform judicial functions nor enforce them upon the people through the medium of a subordinate judiciary.

Cooley's Const. Lim. (6th Ed.), 113-115.

Printed Tr., p. 534.

POINT 27.

"This rule is illustrated in fact by the Constitution of Indiana which provides in its bill of rights: 'All courts shall be open; and every man, for injury done him in his person, property or reputation shall have remedy *by due course of law*.' At the time the affected trust agreements were written it became, as it is of course now, an engagement in the obligation that 'due course of law' should attend the remedies sought in an action on the contract. The legislature therefore could not cut down or limit the 'due process of law.' Any function in that respect was judicial and not legislative.

Const. Ind., Art. I, Sec. 12.

Printed Tr., p. 534.

POINT 28.

"Where the constitution imposes a duty or protects a right the legislature can neither enlarge the duty nor impair the right. If that could be done, then the legislature could by statute amend the constitution.

Ex Parte France, 176 Ind. 72.

Curless v. Watson, 180 Ind. 86.

Printed Tr., p. 534.

POINT 29.

"This act of the general assembly is a species of recall of judicial opinion.

Domestic Block Coal Co. v. De Arney, 179 Ind. 592.

Printed Tr., p. 534.

POINT 30.

"The recall of judicial opinion is not authorized in Indiana. It exists in England because the House of Lords is both a part of the Parliament and the supreme judicial tribunal. It has, therefore, both political and legislative power on the one hand and judicial power on the other. At one time, if not now, the royal prerogative embraced the right of recall of judicial opinion. This power was exercised sparingly and its utmost notable instance, perhaps, was when the attempt of Lord Coke to destroy the Iex Mercatoria was challenged by Lord Mansfield who sought to preserve the Iex Mercatoria as in the equity jurisprudence. The royal prerogative sustained Lord Mansfield and thereafter instruments not under seal, as notes and bills of exchange, were freely admitted to a place as the basis of suits for judicial redress. Thus again the statute of 4 Anne, Chap. 16, Sec. 12, 'An act for the amendment of the law and the better advancement of justice,' was employed to prevent the expansion of Lord Holt's opinion in *Clarke vs. Mundall* (Martin?), 1 Salk, 124 S. C., to the effect that on the date of maturity of a bill there could be no accord and satisfaction if payment were made in money of less value than the face of the note, though such accord and satisfaction might be accomplished if the payment were made with a horse or any other subject of property else than money. (Cranch: "Promissory notes before and after Lord Holt.") In the federal government where the congress is given control over specific property an act of congress may

recall a judicial opinion which affects such property. There the recall traces not to the power of the congress over jurisdiction of the judiciary as the rule is in England, but to the power of the congress over the subject of that judicial opinion.

State of Pennsylvania v. Wheeling, Etc. Co., 18 How. 421.

Printed Tr., pp. 534-5.

POINT 31.

"But the senate is without the judicial power possessed relatively by the House of Lords.

Kilbourn v. Thompson, 103 U. S. 166; 26 Law Ed. 377.

Printed Tr., p. 535.

POINT 32.

"Under our constitution the legislature may define a court's jurisdiction of causes. But that power does not involve the independence of the judiciary once created to employ the common language of the people as that language is spoken, nor to direct the interpretation and construction of contracts. The rule is that where power is lodged to hear and determine the authority thus created will not be abridged by a restriction in the use of words so defined as to transgress the meaning of the common language of the people.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294.

Galveston, Etc. v. Texas, 210 U. S. 217, 227.

St. Louis, Etc. Co. v. Arkansas, 235 U. S. 350, 362.

Kansas City v. Kansas, 240 U. S. 227, 231.

Mountain, Etc. vs. Washington, 243 U. S. 219.

Printed Tr., p. 535.

POINT 33.

"In Indiana the judicial and the legislative powers are segregated by Art. III of the Constitution. The legislature clearly is without power to impose terms of conditions upon the judicial interpretation and determination of contracts, and in so far as the act assumes to bind a court by the conclusions of a pleader in the interpretation of a contract the act is in conflict with both Federal Constitution as to the due process clause, the equal protection of the laws clause, the contract clause and it contravenes also the Constitution of Indiana, Art. III, and Sec. 12 of Art. I."

"And appellants say that the Supreme Court of Indiana denies to appellants and to each of them a hearing and consideration of said Federal questions on the sole ground that the statement of them is confused with argument, whereas the Supreme Court of the United States has declared the rule to be the Federal question is presented if it be distinctly made at the proper time.

"Wherefore appellants and each of them pray that there be granted to them a rehearing of this cause and that upon such rehearing the judgment of Hamilton Circuit Court be in all things reversed, and they pray for all proper relief.

Printed Tr., p. 536.

PRAYER FOR REVERSAL.

"Wherefore and upon consideration of the several errors assigned, and because of the numerous errors apparent upon the face of the record, all to the wrongful prejudice of these plaintiffs in error, they humbly pray that the judgment of the Supreme Court of Indiana and the judgment of the Hamilton Circuit Court of Indiana be in all things reversed, and that plaintiffs in error be awarded all proper relief."

Printed Tr., p. 536.

BRIEF OF THE ARGUMENT.

In this brief of the argument it will be our purpose:

To show the Federal questions present in this case and that they are (a) the impairment of the obligation of a contract, (b) the denial of due process of law and (c) the denial of the equal protection of the law; to show how the questions are presented and to review the authorities which sustain the validity of the presentation.

IMPAIRMENT OF THE OBLIGATION OF A CONTRACT.

The obligation of a contract embraces the law of the state in which the contract is made, except in those unusual situations, not present here, however, where the parties expressly stipulate that certain laws shall prevail or be excluded from the consideration of the contract; and into all contracts the Constitution of the United States enters as an essential part.

Remedies for the protection of rights under a contract enter into and are a part of its obligation, and as such they cannot in any degree be impaired. In *Edwards v. Kearzey*, 99 U. S. 595; 24 Law Ed. 793, Mr. Justice Swayne, speaking the opinion of this court, examined the various definitions of "obligation" and "impairment" in respect of contracts protected by the Constitution of the United States and in course of his statement of the controlling principles, said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, ceases to be and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of

right and remedy are inseparable. "Want of right and want of remedy are the same thing." 1 Bac. Abe. tit. Actions in General. Letter B. * * *

"It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement.

Von Hoffman v. Quincy, 4 Wall 435; 18 Law Ed. 403.

In *Green v. Biddle*, 8 Wheat 1; 5 Law Ed. 547, this court said, touching the point here under consideration: "It is no answer, that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the contract as if they overturned his rights and interests.

"One of these tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force.

Bank v. Sharp, 6 How. 301; 12 Law Ed. 447.

In *Green v. Biddle*, 8 Wheat 1; 5 Law Ed 547, Mr. Justice Washington, speaking the opinion of this court on the rehearing of the case, at page 76, said: "A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them, will pass a right to the land itself. Shep. Touch. 93. Co. Litt. 4, b. "For what," says Lord Coke, "is the land but the profits thereof."

Nor can there be any play upon words as to distinctions between "remedies" and "processes" of law.

This court has held that the right to have recourse to processes of the law was an essential part of a contract and that it could not be impaired in the presence of the contract clause of the Constitution of the United States.

Bronson v. Kinzie, 1 How. 311; 11 Law Ed. 143.
McCracken v. Hayward, 2 How. 608; 11 Law Ed. 397.
Lessee of Gantly v. Ewing, 3 How. 708; 11 Law Ed. 794.
Planters Bank v. Sharp, 6 How. 301; 12 Law Ed. 447.
Curran v. Arkansas, 15 How. 304; 14 Law Ed. 705.
Hathorn v. Calif., 2 Wall 10; 17 Law Ed. 776.
United States v. Quincy, 4 Wall 535; 18 Law Ed. 403.
Christmas v. Russell, 5 Wall 290; 18 Law Ed. 475.
Clark v. Reyburn, 8 Wall 318; 19 Law Ed. 354.
Edwards v. Kearzey, 99 U. S. 595; 24 Law Ed. 793.
Brine v. Hartford Fire Ins. Co., 96 U. S. 627; 24 Law Ed. 858.
Daniels v. Tearney, 102 U. S. 415; 26 Law Ed. 187.
Seibert v. U. S., 122 U. S. 284; 30 Law Ed. 1161.
McGahey v. Virginia, 135 U. S. 662; 34 Law Ed. 304.
Barnitz v. Beverly, 163 U. S. 118; 41 Law Ed. 93.
Shapleigh v. San Angelo, 167 U. S. 648; 42 Law Ed. 310.
Bradley v. Lightcap, 195 U. S. 1; 49 Law Ed. 65.

At the time this contract was written it was the law

of Indiana that parties to contracts should enjoy wide latitude in stating the terms and provisions of their contracts and that as these terms and provisions were written by the parties so they would be enforced by the courts.

McClellan v. Coffin, 93 Ind. 456, 465.
Vinton v. Baldwin, 95 Ind. 433.
Indianapolis Conservatory etc. v. McConnell, 70 Ind. App. 597.

And where the terms of a contract were doubtful the courts would adopt that construction which the parties had put upon the contract.

Morris v. Thomas, 57 Ind. 316, 322.
Aimen v. Hardin, 60 Ind. 119, 122.
Johnson v. Gibson, 78 Ind. 282, 284.
Chicago v. Sheldon, 9 Wall 50; 19 Law Ed. 594.
Old Colony Trust Co. v. Omaha, 230 U. S. 100; 57 Law Ed. 1410.

At the time these contracts were made it was the law of Indiana that a *cestui que trust* could protect a trust estate against the malfeasance and misfeasance of the trustee. The subject of trusts is largely controlled with statutes, one section of which reads as follows:

"Sec. 12. Trustees having violated or attempted to violate any express trust, or becoming insolvent, or of whose solvency or that of their sureties there is reasonable doubt, or for other cause in the discretion of a court having jurisdiction, may, on petition of any person interested, after hearing, be removed by such court and all vacancies in express trusteeships may be filled by such court."

1 Burns R. S. 1914, Sec. 4023.
Zimmerman v. Makepeace, 152 Ind. 199.
Wheatcraft v. Wheatcraft, 55 Ind. App. 283.

Courts of chancery had power independent of the statute to remove trustees for cause.

Mazelin v. Rouyer, 8 Ind. App. 27.
Ex Parte Kilgore, 120 Ind. 94.

The procedure in cases where the *cestui que trust* sued was definite and comprehensive.

Raymond v. Simonson, 4 Blackf. (Ind.) 71, 82, 85.
Smith v. Calloway, 7 Blackf. (Ind.) 86, 89.
Cunningham v. McKinley, 22 Ind. 149.
Albert v. State ex rel., 65 Ind. 413, 420.
Milner v. Hyland, 77 Ind. 458, 461.
Hileman, Admr. v. Hileman, 85 Ind. 1, 5.
Langsdale v. Woollen, 99 Ind. 575, 586.
Board v. State, 103 Ind. 497.
Harvey v. Ward, 111 Ind. 471.
Thomas, Admr. v. Merry, 113 Ind. 83, 95.
Daugherty v. Wheeler, 125 Ind. 421, 424-426.
Wilson v. Brookshire, 126 Ind. 497, 501.
Parks v. Satterthwaite, 132 Ind. 411, 416.
Warner v. Warner, 132 Ind. 213, 216.
Jones, Exr. v. Henderson, 149 Ind. 458, 460-466.
Stanley's Estate v. Pence, 160 Ind. 636, 643.
Hitchcock v. Cooper, 164 Ind. 632-639.
Philippi v. Philippe, 115 U. S. 151, 156-158; 29 Law Ed. 336.
Speidel v. Henrici, 120 U. S. 377; 30 Law Ed. 718, 719-720.
Felix v. Patrick, 145 U. S. 317, 330-332; 36 Law Ed. 719, 725-726.
Patterson v. Hewitt, 195 U. S. 310, 321-322; 49 Law Ed. 214, 219.
Benson v. Dempster, 183 Ill. 309; 55 N. E. 655.
Patterson v. Hewitt, 11 N. M. 42; 66 Pac. 565; L. R. A. 658.
Felkner v. Dooley, 28 Utah 239; 78 Pac. 366.
Thorne v. Foley, 137 Mich. 651; 100 N. W. 905.

There are presented upon the record here, two conflicting opinions and judgments of the Supreme Court of Indiana, both interpreting and construing in this action one and the same contract. As noted *supra* the first of these opinions held the affected contract to be a trust agreement and its administration to be controlled by the law of trusts. The second of these opinions held the affected contract to be one wherein there had been a perfected sale of the real estate by Dora E. Rooker and William V. Rooker to the trust company upon consideration which had been discharged, so that only a moral obligation remained upon the trust company to pay Dora E. Rooker any further sum, and this obligation was exposed to the contingency that the trust company should elect to sell the property upon terms and for a price which, after satisfying the trust company, would thereafter leave anything for Dora E. Rooker. Clearly, then, the second opinion put the contract in that class known as imperfect obligations where the sole standard of performance was the conscience of the obligor.

It is the law of Indiana, as it is of this court, (1) that the first of these opinions immutably fixed the obligation of the contract and (2) that the second opinion impaired that obligation. When the law of Indiana once fixed the law of this contract, that law thereafter could not be changed because of the contract clause of the Federal Constitution.

Yazoo, Etc., Co. v. Adams, 180 U. S. 1, 14; 45 Law Ed. 395, 404.

Board of Supervisors v. Kennicott, 94 U. S. 498; 24 Law Ed. 260.

New Orleans v. Warner, 180 U. S. 199, 203; 45 Law Ed. 493, 495, 496.

DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

It is the law of Indiana, as it is of this court, that a

distinction exists between (1) the rights of a plaintiff to elect a remedy and (2) the rights of a defendant to elect a defense. Where the plaintiff sues he may bring the wrong action. He may not therefore be concluded from bringing that form of action which properly is in accord to the remedies which he is lawfully entitled to pursue. But where a defendant is challenged to assert his rights under a contract he must present every defense he has because the rule of *res adjudicata* contemplates that everything will be concluded which (1) was put in issue and (2) also everything which should have been put in issue.

This action was begun by the plaintiffs in error and the defendants in error were challenged to assert all their defenses in answer to the complaint.

When this action was begun the complaint upon which the case was tried alleged that The Fidelity Trust Company had been made the conventional trustee of the estate of Dora E. Rooker. The making of the trust agreement was recited and the memorandum of the trust agreement was recited, and a copy of the memorandum was exhibited with the complaint as the statutes of Indiana require shall be done.

Sec. 368, 1 Burns R. S. 1914.

There was also exhibited with the complaint the written notice of repudiation served on Dora E. Rooker and William V. Rooker on October 28, 1912, by The Fidelity Trust Company in its corporate capacity proper and The Fidelity Trust Company as trustee of the estate of Dora E. Rooker.

Printed Tr., pp. 13-21.

It was the duty of The Fidelity Trust Company, as such defendant, at that time to set up its interest as trustee. In the alternative The Fidelity Trust Company might elect to repudiate the trust agreement and renounce its duties under the office of trustee. The latter course was elected. The trust company as trus-

tee filed no answer. The trust company not as trustee answered the complaint with a general denial and filed a counter claim in which it set up the trust deed as a mortgage and asked that it be foreclosed. Its defense against the charges of maladministration as trustee were answered with the defense that it had no duties as trustee because the instrument under which it held was not a trust agreement but was a mortgage.

Printed Tr., pp. 22-26.

It was the duty of the trust company at that time to set up its trusteeship and defend the trust estate. The trust company elected to do otherwise. It cannot change after the first case has gone to judgment. The issue became *res adjudicata.*

Northern Pac. R. Co. v. Ellis, 143 U. S. 458; 36 Law Ed. 504.

Great Western, Etc. Co. v. Burnham, 162 U. S. 339; 40 Law Ed. 991.

Illinois v. Illinois Central R. Co., 184 U. S. 77; 46 Law Ed. 440.

Thompson v. Maxwell, Etc. Co., 158 U. S. 451; 42 Law Ed. 539.

Thompson v. Maxwell, Etc. Co., 168 U. S. 539; 42 Law E. 539.

Yazoo, Etc. R. Co. v. Adams, 180 U. S. 7; 45 Law Ed. 395, 404.

New Orleans v. Warner, 180 U. S. 199; 45 Law Ed. 493.

It was pointed out repeatedly on the second trial in the circuit court had under the mandate of the first opinion that the new pleadings tendered and the evidence adduced were in contravention of the former opinion of the Supreme Court of the state.

Printed Tr. at foot of page 195, 152-3, 424, 425, 218, 219, 220, 221.

These objections were carried into the motion for

new trial and in the assignment of errors in the Supreme Court.

Printed Tr., pp. 221-224, pp. 3-7.

The action of the Supreme Court in denying potency to the first opinion of that court is assigned as error here.

Printed Tr., 498, Sec. 2.

In disposing of some of these objections the Supreme Court of the state, on the second appeal, disregarded the objections stated in the demurrer and at the trial, that the acts taken were in contravention of law of the case as settled on the first appeal, and as to the motions to strike out, etc., which specifically called the court's attention to the unlawful theory of the defendants' new counter claims, the Supreme Court of the state found its repose against these objections on the ground that it was not error to overrule a motion to strike out. Speaking to this point in its second opinion, the Supreme Court said:

"The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter claim. An examination of the record discloses that the pleading to which reference is here made was appellee's cross-complaint as amended after the decision of this court in the case of *Rooker v. Fidelity Trust Co.*, 185 Ind. 172.

"The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court no sufficient cross-complaint or counter claim could have been written by appellants. This phase of the case need not be discussed in disposing of these motions, for it is settled law that error cannot be predicated upon the action of the court in overruling a motion to tsrike out a part or all of a pleading.

Woodham v. Jennings, 164 Ind. 555;
Pfau v. State ex rel, 148 Ind. 539."

A complete answer to the above comment of the court is found in the fact that these motions raised Federal questions upon the record. The same objections which the court found in the motions to strike out were found, also, in the demurrer to the complaint.

In the demurrer of the plaintiffs, that the second amended counter claim as supplemented does not state facts sufficient to constitute a cause of action, these points, as points are required by the statute to be made, appear, viz.:

"1. The second amended counter claim as supplemented is joint as to both plaintiffs and must be good as to both or bad as to both. There is no privity of contract between the plaintiffs and either of the defendants except the defendant as trustee. *It contravenes the mandate of the Supreme Court in this cause to admit issues in this cause which are outside of those within the terms and effect of the trust agreement and the suit for an accounting as between these plaintiffs and the trustee.* If the trustee borrowed money from Fidelity Trust Company, or any other bank or banker whomsoever, such transaction would not, under the trust agreement, constitute or create a privity between such bank or banker and these plaintiffs.

"2. Steps taken by The Fidelity Trust Company, in its corporate capacity proper, to fortify the title it sought to acquire, and did acquire, unlawfully, were acts done in aid of its own wrong and have no place in an accounting between the *cestuis que trustents* and the trustee.

"3. The trustee and its co-plaintiff, having elected to repudiate the trust agreement and having thereby caused the *cestuis que trustents* to change their situation, greatly to their loss and damage, will not be heard to declare that such act of repudiation was void and that such an election to repudiate is to be disregarded.

"4. The trustee having elected, with the aid and participation of its co-plaintiff, to repudiate the trust and having thereupon caused the plaintiffs to suffer loss and damage and to change their situation, could not in any event ask that said trust agreement be reinstated, except upon a tender that equity be done these plaintiffs. There is no tender of equity made."

Printed Tr., pp. 195-196.

In the supplemental complaint it is averred by Dora E. Rooker and William V. Rooker, "that since the bringing of this action and since the filing of the amended complaint herein, The Fidelity Trust Company in its corporate capacity proper, and The Fidelity Trust Company as trustee, wrongfully and unlawfully pursued each of the purposes and acts hereinafter more particularly set forth and by such pursuit and acts have sought to consummate and make effective the wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, but at a particular time as to which these plaintiffs bring without information are unable to state, whereby said trust company in its corporate capacity proper was designing and intending to sequester, take over and appropriate and convert as its own gain, advantage and profit, the entire property and value of said trust estate of the value, to-wit, $85,000, to the wrongful and unlawful exclusion of these plaintiffs and of all the just, lawful and proper beneficiaries of said trust estate."

Then follows a recital of payments which the trust company asserted were made by it as mortgagee and without any obligation as trustee; that these payments went to judgment on foreclosure of mortgage; that thereupon the property of the trust estate was sold at sheriff's sale and title acquired by the trust company in contravention of the trust agreement and the damage of Dora E. Rooker and William V. Rooker fifteen

thousand dollars in and about the defense of said actions, etc.

In a second paragraph it is averred that while the litigation was in progress and while the property of the trust estate was in the trust company, there was waste and damage to the amount of twenty-four thousand five hundred dollars, the details of which are stated.

Printed Tr., pp. 147-155.

In addition to the motion to strike out, on which the Supreme Court comments, and the demurrer which specially set up the contravention of the former opinion, there was a motion for judgment on the special findings of facts. As to this motion the Supreme Court said:

"The fourth error relied upon for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment in a special finding of facts is not recognized by our practice."

Absolutely to the contrary, and to meet this palpable evasion of duty by the Supreme Court of Indiana we quote the controlling statute and refer to some of the many decisions of the Supreme Court thereon as follows, viz.:

"Sec. 591 (574)-441. Where the verdict is special or there has been a special finding on particular questions of fact, the court shall render the proper judgment."

Sec. 591, 1 Burns R. S. 1914.

(NOTE: The numerals 591, at the head of this section indicate the section number in the Indiana Revised Statutes of 1914. The numerals 574 indicate the number of the same section in the Indiana Revised Statutes of 1901. The numerals 441 indicate the number of the same section in the Indiana Revised Statutes of 1881. In the civil code of 1881 appear the additional num-

erals 351, which indicate the number of the same statute in the first civil code adopted after Indiana changed its Constitution in 1852.)

In *Bell's Admx. v. Golding* (1866), 27 Ind. 173, 184, the court below made a special finding of facts and the Supreme Court reversed the judgment and entered this mandate, viz.: "The judgment is reversed, with costs, and the cause remanded, with directions to the court below to enter a judgment for the appellant upon the special finding of facts."

(NOTE: In this case it is worth while to note the names of counsel. They include Thomas A. Hendricks, who was a governor of Indiana, a senator of the United States and its vice-president; Oscar B. Hord, a leader of the Indiana Bar; Abram W. Hendricks, recognized, even today, as the most thorough lawyer ever in Indiana; John T. Dye, long a leader of the Indiana Bar, for many years general counsel of the Big Four railroad system, and whose work has left its imprint on the record of this court; Mr. Addison C. Harris, long a leader of the Indiana Bar, ambassador of the United States to Austria in the term of President McKinley. These observations may be an animadversion, but they should have their effect in proving that the Bar of Indiana has recognized and employed the rule of practice which in this case the Supreme Court denounced as "unknown.")

In this case the motion had the effect to challenge a special finding which was in contravention of the Supreme Court mandate under which at the time the circuit court pretended to be acting.

The rule and procedure at issue came into the Indiana code on the adoption of the Constitution of 1852, from the Chancery practice. Speaking to this point in *Gale v. Grannis* (1857), 9 Ind. 140, 143, Judge Perkins, for the Supreme Court, said: "This is an old Chancery cause, and it has been the invariable rule of the court

to make a final disposition of all such on the hearing here, instead of remanding for a new trial. The parties have respectively made their case, and put it upon record. We suppose they have made the best they could. Litigation must sometime cease. * * * The decree is reversed with costs. Cause remanded, with instructions to the court below to enter a decree for the amount of the mortgage and interests.")

Jeffersonville, Etc. Assn. v. Fisher, 7 Ind. 699.
Gale v. Grannis, 9 Ind. 140.
Nichols v. Glover, 41 Ind. 24.
McAfee v. Reynolds, 130 Ind. 33.
Shoner v. Penna. Co., 130 Ind. 170.
Brown v. Ohio, Etc. R. Co., 138 Ind. 648.

Boardman v. Griffin (1875), 52 Ind. 101, 160-7: "The court has very clearly in the special findings, found against the plaintiff as to the case made by his complaint and we do not see why judgment should not have been rendered against him. * * * In our judgment the court should have rendered judgment on the findings for the defendants. * * * The judgment is reversed with costs, and the cause remanded, with instructions to render judgment for the defendants on the special findings."

Dixon v. Duke (1882), 85 Ind. 434, 436: "If the facts found are not sufficient to entitle a plaintiff to judgment, then the defendant's motion for judgment should be sustained unless the case is one where the defendant has the burden of proof. * * * The rule is, that it is the facts, and not the evidence, which are to be considered in determining the sufficience of a special verdict. In strictness, neither a special finding nor a special verdict should contain anything except the facts, but if facts and evidence are both stated, the court will act upon the facts and not upon the evidence. (Citing cases.)"

Johnson, Admr. v. Culver, Admr. (1888), 116 Ind.

278, 280: "The questions were presented by motions for judgment on the facts found, and this was the appropriate procedure. A party who deems himself entitled to judgment on a special verdict should move for judgment, and, if unsuccessful, preserve the question with an exception. (Citing cases.)"

Louisville, Etc. R. Co. v. Green (1889), 120 Ind. 367, p. 373: "Before the rendition of the judgment on the verdict in favor of the appellee, the appellant moved the court for judgment in its favor on the special verdict as to the cow killed on the highway crossing, and the court overruled the motion. This was a proper motion. The two causes of action were clearly distinct, and if the facts found in the special verdict entitled the appellee to a judgment in its favor upon the one cause of action, the motion should have been sustained. (Citing cases.)"

Puterbaugh v. Puterbaugh (1891), 131 Ind. 288, 299: "It is suggested, rather than asserted, that the verdict is outside of the issue, and we are referred to the cases of Boardman v. Griffin, 52 Ind. 101; Thomas v. Dale, 86 Ind. 435; Hasselman v. Carroll, 102 Ind. 153. If the assumption that the special verdict is entirely outside of the issues is correct, the appellant's motion for judgment should have been sustained. We thing it clear that where the material facts stated in a special verdict are wholly outside of the issues the defendant in such case is entitled to judgment, for the plaintiff can only recover according to the allegations of his complaints. Palmer v. Chicago, Etc. R. Co., 112 Ind. 250. The question is properly presented by a motion for judgment on the verdict. (Citing cases.)"

Royse v. Bourne (1897), 149 Ind. 187, 189: "If the appellants believed they were entitled to move for judgment upon the special findings, they ought to have proceeded upon that theory."

Brunson v. Henry (1898), 152 Ind. 310. Motions for judgment on a special finding of facts were considered at length by the supreme court and the cause decided accordingly.

Ever since the enactment of the statute *supra* the rules in respect of special findings have been in Indiana.

1. To test whether a special finding is within the issues, the procedure is with a motion for judgment on the special findings.

2. To test whether a special finding is sustained with the evidence, the procedure is with a motion for new trial, assigning that the special finding is not sustained with sufficient evidence.

3. To test whether the court properly states the conclusions of a law upon special findings which are within the issues and which are sustained with sufficient evidence, the proper procedure is to except to the conclusions of law.

Therefore it is obvious that the Supreme Court of Indiana when, in this case on the last appeal, it read out of the law and excluded from application, the well established procedure of a motion for judgment on the special findings the effect of the court's action, if not, also, its purpose and intent, was to exclude from this case and destroy the effect of the first decision. But the first decision had become the law of Indiana as to this case; it had entered into and become a part of the contract and constituted, therefore, an essential part of the obligation of that contract.

INDIANA'S REMEDIAL LAWS.

Indiana has remedial laws which enter into the obligation of a contract and which are of the essence of right under the due process clause and the equal protection of the law clause of the Federal Constitution. These rules of pleading, practice and procedure find

their first exposition in a classification of the nature of rights and remedies in contract cases upon default in the performance of the contracts. These rules may be summarized insofar as they apply to rights of action as follows, towit:

1. There are those cases where there has occurred maturity of the contract and the default consists in the failure of the obligor to perform. These cases may be illustrated with a promissory note which passes the date of maturity without payment, and the party aggrieved is required to sue.

2. There are those cases where there has occurred a breach of an executory contract by one party without delinquency on the part of the other party. These cases may be illustrated with an executory contract for the sale of goods, with the employment of services, etc., in which cases the party charged with the duty of furnishing the goods or the services defaults or repudiates his obligations and the party aggrieved is required to sue.

3. There are those cases where there has occurred a breach of an executory contract by one party without delinquency on the part of the other party and the party delinquent, or those in privity with him, is obliged to sue.

These cases may be illustrated with contracts for public work where the contractor abandons or repudiates his engagement after having performed a material part thereof and the contract is re-let at the expense of the primary contractor and the sureties on his bond, and the primary contractor or those in privity with him is required to sue.

These rules of pleading, practice and procedure find their second exposition in the trial of cases in the control of parties litigant, in the employment and control of triers of the facts and with the conduct of courts in their action upon verdicts, special findings, etc. The

rules may be summarized insofar as they apply to practice and procedure as follows, towit:

1. He who has the burden of proof must recover *secundum allegata et probata*, or not at all.

2. He who is made a defendant must set up every defense he has or he will, thereafter, be barred with the rules of *res adjudicata*, if he shall later attempt to institute a new suit; or he will be barred with the rule of the law of the case, if he shall attempt to amend his pleadings in a pending action after a former appeal to the supreme court of the state. This rule is particularly stringent in cases concerning contracts; also, in cases concerning the title to real estate. It involves also the rule of merger which is to the effect that a contract which has once entered into adjuduation is merged in the judgment or judicial order and, therefore, is no longer capable of performance in *pais*. This implies that having lost its executory quality it is thereafter incapable of creating *in pais* any new cause of action or of enlarging the scope of any action previously begun. In this situation, there being after the adjudication or judicial order, a merger which withdraws capacity from the merged contract to create *in pais* any new or enlarged cause of action, he who asserts a right must show a new authority for doing what he may have done subsequent to the merger or he will be deemed to have made himself a volunteer and denied a remedy. Nor is this any harsh rule of the law. In cases where the maintenance of property is essential and there are conflicting interests, the court will make a sequestration of the property with a receivership and will preserve the property for the mutual benefit of all parties concerned. If one of the parties should oppose the receivership and thereupon expend his own money to preserve the property *pendente lite* he will be dealt with as a volunteer if the final adjudication is against him on the main issue.

3. Upon the trial of the case, it is objectionable to offer evidence which is irrelevant and immaterial to the issues tendered with the pleadings, and it is reversible error if such evidence be admitted over objection.

4. Upon the trial of a case it is objectionable to instruct a jury upon matters which are beyond the issues or in contravention of the law of the case.

5. Upon the return of a special verdict by a jury or the making of a special finding of facts by a court, a motion for judgment on the special verdict or on the special findings of fact, is employed to test and determine whether the special verdict, by the jury, or the special finding by the court, is within the issues of the case. This rule is employed to measure the special verdict or the special findings, as the case may be, according to the standards of the case as laid down in the pleadings of the parties.

6. Upon the return of a special verdict by a jury, or the making of a special finding by the court, a motion for new trial, assigning that the special verdict or the special finding, as the case may be, is not sustained with sufficient evidence, is employed to test and determine whether the trier of the facts has departed from the material and relevant evidence.

7. Upon the making of a special finding of facts, if it be within the issues of the case and sustained with sufficient evidence, the court states conclusions of law and to these exceptions may be taken to determine whether the court has correctly applied the law upon a proper state of facts.

8. It is the rule that each of these steps shall be taken and the issues presentable thereon be made and disposed of before any subsequent step shall be admissible. Thus we have an orderly method of adjudication, towit:

(1) Does the complaint present a proper challenge?

(2) Is the challenge of the complaint properly met?

(3) Are the facts offered to be proven consistent with the issues submitted for trial?

(4) Is the result of the trial consistent with the cause submitted?

(5) Is the law as stated upon the record, consistent with the fixed standards of the law?

All these steps are separate and distinct parts of the law of Indiana and they constitute its process for the remedial determination of the rights and grievances of the people of the state. Nor can these steps be exchanged nor supplanted with one another although they are connected. Like the head and the feet of a man, they are connected and each is an essential part of the same unit. But they are not interchangeable in either position or function. They cannot be blended so as to substitute the separate functions of either for the synthetic function of the entire organism. The complaint must precede the answer, the answer must precede the joinder of issue, the joinder of issue must precede the trial, the trial must supplement the issues, the special finding must accord with (1) the issues and (2) the evidence; the law, as concluded, must be consistent with the general law upon the subject affected and the judgment of the court must be accordingly.

The judgment may intervene at any point where the step taken may be a departure from the law. The judgment may be upon the pleadings, it may be upon the statement of the case by counsel; it may be upon the evidence; it may be upon the verdict; it may be upon the conclusions of law.

The precedure thus prescribed constitutes the remedial process of the state for the enforcement of rights and the redress of wrongs. It constitutes both the essence and the method of adjudication. Its consummation is the judgment of a court of competent

jurisdiction. The denial of any right to judgment is a denial of judgment. The denial of judgment strikes down the obligation of a contract in a contract case where the issues, or the law, are subjected to departure. The denial of judgment when judgment is due, impairs the obligation of an affected contract. This impairment shall not be consummated without contravention of the contract clause of the Federal Constitution.

To withhold judgment when judgment is due is a denial of the due process of law and this the Fourteenth Amendment of the Federal Constitution prohibits.

To withhold judgment when judgment is due to a particular person, although in like circumstance judgment would be awarded to others, is a denial of the equal protection of the law and this cannot be consummated without contravention of the Fourteenth Amendment of the Federal Constitution.

Special findings must be within the issues. In this case the issues were as a matter of law encompassed wholly within the mandate of the Supreme Court. Whether the parties have got a trial of the case they submitted, is tested with a motion for judgment on the special verdict. This motion searches the record for variances between the pleadings and special findings and it is sustained against the party who has the burden of proof. The logic for this reposes in the fact that where a special verdict is silent as to material averments in a pleading the presumption of law is that the silence is due to a failure of proof. Upon such failure of proof the trial court is not permitted to write into its special finding a case other than the one submitted for trial. Until there is a lawful special finding there can be no conclusions of law to which exceptions are available.

Boardman v. Griffin, 52 Ind. 101, 106-7.

Terry v. Shively, 64 Ind. 106, 111.
Dixon v. Duke, 85 Ind. 434, 436.
Thomas v. Dale, 86 Ind. 435, 438.
Quick v. Brenner, 101 Ind. 230, 235.
Johnson v. Culver, 116 Ind. 278, 280.
Louisville v. Green, 120 Ind. 367, 373.
Puterbaugh v. Puterbaugh, 131 Ind. 288, 299.
Willis v. Crowder, 134 Ind. 515.
Citizens Bank v. Judy, 146 Ind. 322, 349.
Royse v. Bourne, 149 Ind. 187, 189.
Brunson v. Henry, 152 Ind. 310.

The motion for judgment on the special findings in this case was given at the earliest opportunity and without any laches on the part of the plaintiff. This is all the law requires. The court could not so frame its record as to exclude the plaintiffs from the exercise of their legal rights. The statement of the conclusions of law along with the special findings was not a delinquency of the plaintiffs and it does not affect any abridgement of their rights. When the trial court presented two papers concurrently the plaintiffs had the right to their legal exceptions to each of these papers in the order of their causal effect and the taking of exceptions to one of these papers was not a waiver of the right to except to the other in due time, provided, the last exception was without any intervening action upon the matter to which the last exception was addressed. The cases cited by the Supreme Court of Indiana to sustain its ruling in this particular are not in point. In *Dickson v. Rose*, 87 Ind. 103, the court's own words show the irrelevancy of the case to any application here. We quote the court at page 104: "The exception to the conclusions of law stated by the court upon the facts specially found was not taken when the conclusions of law were announced and entered upon the court's docket. The next step after the entry of the finding and conclusions of law was to file a mo-

tion for new trial and having excepted to the overruling of this motion they then in open court, excepted to the conclusions of law."

In *Barner v. Bayless*, 134 Ind. 600, the intervening motions filed were not motions which challenged the relevancy of the findings to the issues. We quote the court at page 605: "There were no exceptions taken to the conclusions of law at the time they were filed. After the special finding of facts and conclusions of law thereon were filed by the court, the appellants filed a motion to make the finding of facts more specific. They also filed a motion to strike out parts of the special finding of facts, each of which motions were overruled by the court. They then filed a motion for *venire de novo* which the court also overruled. After these several motions had been ruled upon they entered an exception to the conclusion of law. This was too late."

In *Chicago, Etc. R. Co. v. State ex rel*, 159 Ind. 237, several days intervened, and a motion to amend the special findings was presented and overruled before the exceptions were taken. We quote the court at page 241: "The special findings and conclusions of law stated thereon were announced and filed on December 15, 1900. No exceptions to the conclusions of law were taken on that day. Afterward, on December 21, 1900, appellant filed a motion to amend the special findings as set forth in said motion, which motion was overruled by the court, after which appellant excepted to each conclusion of law."

In *Medical College v. Comingore*, 140 Ind. 206, the special findings and conclusions of law were filed on September 25, 1891. Afterward, on October 1, 1891, judgment was rendered for the appellees, and thereafter the exception was taken to the conclusion of law.

If the present position of the Supreme Court of Indiana be correct, then exceptions never can be taken to

conclusions of law, because the statute, in that event, would mean that the findings, the conclusions of law and the judgment were concurrent events.

The Supreme Court of Indiana devotes space to its reasons for refusing to consider the exceptions to the conclusions of law on the ground that these exceptions were not made prior to the motion for judgment on the special findings. Elsewhere we have shown that the motion for judgment had the function of searching the record to ascertain if the finding was within the issues. If there were no lawful findings, there were no conclusions of law to which exceptions could be taken.

Slight examination of the statute and the adjudications will convince one that the Supreme Court of Indiana was in error in this matter in this case. The record shows that the findings of facts and the conclusions of law were written upon one and the same paper; that they ran continuously from the first finding to the last conclusion, and that they bore but once the signature of the judge whose name is affixed to them. Tr., pp. 198-214.

The statute and the cases contemplate that the special verdicts are signed; instructions of the court, made a part of the record, are signed; motions for new trial are signed. Signature is evidence of genuineness and authenticity."

Peoria, Etc. Co. v. Walser, 22 Ind. 73, 87.

Upon the complaint herein, the defendant could not at the second trial quiet title because the complaint shows (1) the former judgment and (2) the trust contracts in which Mrs. Rooker had an equity which could not be swept from her.

Ragsdale v. Mitchell, 97 Ind. 458.

In Indiana the rule as to *res adjudicata* is much more comprehensive in actions affecting contracts and real estate than in actions affecting personal property. The distinctions are thus stated by Judge Elliott in *Ulrich*

v. Drischell, 88 Ind. 354, 359: "There is a distinction between actions to determine conflicting claims to property and actions for the recovery of personal judgments. It is quite clear that an action to quiet title requires the parties to put in issue and litigate all titles held or claimed by them at the time the action was instituted." *Green v. Glynn*, 71 Ind. 336; *Lyman v. Faris*, 53 Ind. 498. While it is true, etc.

In *Ulrich v. Drischell*, 88 Ind. 354, Judge Elliott makes a careful survey of the cases affecting as adjudicata and merger. At page 360 the court says: "While it is true that a proceding to foreclose a mortgage is not an action to quiet title, it is also true that in very many essential respects it is closely analogous. The parties are brought into court in such a suit for the purpose of adjusting all equities, rights and interests in the land and the question of their rights to the land is one of the principal and controlling questions of the case. The subject of the controversy is the thing—the mortgaged real estate—and this the decree directly affects for it settles the rights of the parties to it, measures their equities and adjusts their interests. * * * In *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441, it was held that where a junior mortgagee is made a party to answer as to his interest, he must set up all such claims as he may then have. It was said: "The plaintiffs in this action were parties defendants in that suit; their rights were all acquired and existed at the time of its commencement. They were made parties as subsequent incumbrances by judgment or mortgages. It was alleged in the complaints that their several payments, mortgages or other claims were subsequent and subordinate and inferior to the said first mortgage, and the lien, incumbrance, claim and effect thereof, as to all the property, real and personal, there or thereafter, of said railroad company. If there is anything in the principle that

when a party is brought into court and given an opportunity to present his claims and contest the rights asserted against him, he must do so at the peril of being cut off and foreclosed in respect to all such claims, the plaintiffs are clearly estopped from going back of this decree." This case was affirmed by the court of appeals, 54 N. Y. 675.

Thereupon the court proceeded to examine the cases and closed with this summary of what appears generally to be the law:

"We think it must be held that the general rule is that where a party is challenged to assert his interest in mortgaged property, and he appears, answers and pleads by way of cross-complaint, asserting title by mortgage, and obtains a decree upon his cross-complaint establishing the seniority of his lien and directing payments to be made, first of his lien, second of the plaintiff's lien, and, third, payment of the surplus to the mortgagor, the decree concludes him from afterward asserting title under another mortgage held by him at the time of the filing of his cross-complaint, as against one who has bought from the mortgagor and redeemed from the sales made on the judgments and orders embodied in the decree of foreclosure. We cannot perceive how it can be otherwise upon principle. The right which he is asked to make good is his whole interest and claim to the property and he ought to put in issue his entire claim. It is impossible that there can be a complete determination of all claims to the property if a claimant is entitled to assert part and withhold part of his claim."

In *Ricker v. Pratt*, 48 Ind. 73, one who had purchased real estate subject to mortgages which he assumed was sued for the mortgage debt and foreclosure. The sale of land to him had been made upon fraudulent representations which he failed to set up in the foreclosure suit. The court said, as to *res judicita*, that he could not thereafter sue on the cause of fraud.

Fischli v. Fischli, (1825) 1 Blackf. 360: "For whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest."

Cox v. Pruitt (1865), 25 Ind. 90: "This question was settled in the previous decision of this court, and it is *res adjudicata.*"

Comparet v. Hanna (1870), 34 Ind. 74: "It is not only that which the parties actually litigate, which is put at rest by the judgment, but also every other matter which they might have litigated under the issues in the case. Whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case. *Fischli v. Fischli,* 1 Blackf. 360; *Athearn v. Brannan,* 8 Blackf. 440."

Some of the cases hold that the contract is merged in the judgment; that, thus, the contract and the judgment become as one, and thereafter there is no contract separate and apart from the judgment in which the contract is merged. In this view it would, of course, not be competent in one who was bound by the prior adjudication to sue upon the contract without pleading also the judgment of which the contract had become a part. His action, if any, would be to review it in some statutory manner as by petition for rehearing, or to attack it in equity as for fraud, mistake, etc.

Crosby v. Jeroloman (1831), 37 Ind. 264, 275-278.

This principle seems to be contemplated with the rule of this court in *Mason v. Eldred,* 6 Wal. 231.

In other jurisdictions the prohibition against fur-

ther action on the same contract is made to contemplate also the principle that causes of action shall not be split and tried piece meal.

Secor v. Sturgis, 16 N. Y. 548.

We cite some of the cases which make exposition of this rule in Indiana:

Bates v. Spooner (1847), 45 Ind. 489.
Richmond St. R. Co. v. Reed (1882), 83 Ind. 9.
Board v. Pritchett (1882), 85 Ind. 68.
Anderson v. Kramer (1886), 93 Ind. 170.
Richardson v. Jones (1877), 58 Ind. 240.
Sauer v. Twining (1882), 81 Ind. 366.
Hays v. Carr (1882), 83 Ind. 275.
Farrar v. Clark (1884), 97 Ind. 447.
Ulrich v. Drischell (1882), 88 Ind. 354.
Elwood v. Beymer, 100 Ind. 504.
Indiana, Etc. R. Co. v. Koons, 105 Ind. 507.
Center Tp. v. Board, Etc. (1886), 110 Ind. 579.
Green v. Glynn (1880), 71 Ind. 336.
Richer v. Pratt (1874), 48 Ind. 73.
McCaffrey v. Corrigan (1874), 49 Ind. 175.
Landers v. George (1874), 49 Ind. 309.
Greenup v. Crooks (1875), 50 Ind. 410.
Griffin v. Wallace (1879), 66 Ind. 410.
Newcomb v. Wiggins (1881), 78 Ind. 306.
Ballard v. Franklin L. Ins. Co. (1881), 81 Ind. 239.

A JUDGMENT WITHOUT AN ADVERSARY.

Defendants in error are bound by their trial court theory, viz.: That the plaintiffs in error having parted with all their interest in the trust estate were incompetent to bring, and did not bring, the trust estate into court on their complaint. Having asked and got judgment on that theory they are concluded thereby. Their conduct in the premises was an election of remedies. An election of remedies is held to be con-

clusive. The rule applies to pleadings and procedure in court.

John v. Greist, 85 Ind. 503.
Mescall v. Tully, 91 Ind. 96.
Dawson v. Shirk, 102 Ind. 184, 188.
Chicago, Etc. Co. v. Bills, 104 Ind. 13.
Ikerd v. Beavers, 106 Ind. 580, 588.
Green v. Grooves, 109 Ind. 519.
Carr v. Haskett, 110 Ind. 152, 155.
Baker v. Ludlam, 118 Ind. 87.
Aetna, Etc. Co. v. Hildebrand, 137 Ind. 462.
State v. Scott, 171 Ind. 349.
Elliott's Gen. Prac., Secs. 945, 1013.
5 Lawson's Rights, Rem. and Pr. Sec. 2498.

The nominal trustee joined with its creditor, the Fidelity Trust Company, in its corporate capacity proper, as co-plaintiff in a cross-complaint in an action on the trust contract to enforce a claim of the creditor against the trust estate in a cause where the trust estate was not sued; where the trust estate was without notice issued to it or served upon it as to the cross-complaint on which recovery was had. The nominal trustee could not sue itself and it did not sue itself nor the trust estate. The nominal trustee could not defend itself in its own action, nor the trust estate. The trustee is a judgment plaintiff here in a judgment *in rem* against the trust estate on issues tendered against the trust estate by the nominal trustee and as to which issues the trust estate never was sued. The judgment is void. Vide authorities *supra*.

1 Burns R. S. 1914, Sec. 252.
Mitchell v. St. Mary, et al., 148 Ind. 111, 115.
Marion Bond Co. v. Mexican, Etc. Co., 160 Ind. 558, 563.

Denial of due process of law and denial of the equal protection of the law may arise upon a judicial record as it may arise otherwise. In the instant case it arises

upon a judicial record. The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities.

Scott v. McNeal, 154 U. S. 34-45; 38 Law Ed. 896, 901.

Forsythe v. Hammond, 142 Ind. 519; 30 L. R. A. 583.

It was a denial of due process, and it was a denial of the equal protection of the law, and it was the impairment of the obligation of a contract after the first opinion by the Supreme Court for the trial court, without the trust estate having been sued and without any issue being tendered to that effect, to reform the trust deed so as to take from appellants the rights which they had never parted with and which they never had granted away, viz.:

A. The power coupled with an interest in their behalf to protect in any lawful manner the trust as they had created it.

B. The power coupled with an interest in their behalf to protect the trust as they had created it, and which embraced the power retained in them as grantors to appoint a new trustee for cause; and limited any power of appointment by the court to the appointment of a receiver who should sequester the trust estate and hold it *in custodia legis* while the court was engaged with determining the rights of the parties under the trust agreement at the time the litigation began.

C. The power coupled with an interest in their behalf to protect the right of possession and the use of the rents and profits of the trust estate pending the progressive execution of the trust.

D. The power coupled with an interest in their behalf to enforce the obligation that time was of the essence of trust agreement.

"Testing the case by the principle 'that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts and under circumstances repelling all presumptions of fraud, imposition or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is were the appellants entitled to relief? To which we respond decidedly in the negative.' Mr. Justice Catron in *Bank, Etc. v. Daniels*, 12 Pet. 32, 56; I. Ed. 989, 998.

Upton v. Tribilcock, 91 U. S. 50, 23 Law Ed. 206.

Lamborn v. County Commissioners, 97 U. S. 181, 185; 24 Law Ed. 926-929.

Bond v. Coats, 16 Ind. 203.

Oiler v. Gard, 23 Ind. 212, 219.

Town of Ligonier v. Ackerman, 44 Ind. 552, 568-578.

Bennett v. Ford, 47 Ind. 264-269.

Hines v. Board, 93 Ind. 266.

Parker v. Bank, 59 Ind. 189, 192-4.

"The *cestui que trust* may bring a bill or petition for removal, and the court may remove the trustees from office and appoint others in their place when there has been bad conduct, or the trustee is unfit for his office, or to prevent a threatened breach of the trust or any danger to the trust fund."

Perry on Trusts, 5th Ed., Sec. 817.

"Proceedings for the removal of trustees and the appointment of others require some time, as trustees have the right to file answers to the charge against them and to regular and full hearing; and as the *cestui que trust* are entitled to have the fund properly pro-

tected and managed in the meantime, the court may appoint receivers."

Perry on Trusts, 5th Ed., Sec. 818.

"The *cestui que trust* is entitled to enforce the trust, not only against the trustee, but also against those who, with notice, wrongfully claim under the trustee.

Perry on Trusts, 5th Ed., Sec. 821, 822.

Zimmerman v. Makepeace, 152 Ind. 199.

"The powers of trustees under deeds of trust, and of mortgagees under mortgages with power of sale, depend entirely upon the terms of the deeds. Such powers are created by, and exist in the deeds, and of course they exist in the terms in which they are crested and in none others. They are to be exercised by the trustee *in pais*. They are wholly matters of convention and contract between the parties and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. Statutes in some states have regulated their execution, but such statutes do not create the powers themselves."

Perry on Trusts, 5th Ed., Sec. 602g.

In the consideration of a court of equity the *cestui que trust* is actually seized of the freehold.

Croxall v. Sherard, 5 Wall 268; 18 Law Ed. 572.

RIGHTS UPON REPUDIATION.

Upon the repudiation (1) of the trust agreement it became not only the right, but, as well, the duty, of Dora E. Rooker and William V. Rooker to institute this suit to redeem the trust estate and have the court with a receivership administer the trust for the benefit of all parties in interest; that an accounting should be had as to any interest of the defendants in error in the trust estate, and if any such interest should be found

to exist, that a set time be fixed in which that interest should be discharged.

Roehm v. Horst, 178 U. S. 1; 44 Law Ed. 953.
The Eliza Lines, 199 U. S. 125; 50 Law Ed. 115.
Citizens, Etc. Bank v. Davisson, 229 U. S. 215; 57 Law Ed. 1153.
Central Trust Co. v. Chicago, Etc. Co., 240 U. S. 581, 591; 60 Law Ed. 811.
U. S. v. Purcell Envelope Co., 249 U. S. 313; 63 Law Ed. 620.
Kurtz v. Frank, 76 Ind. 594.
Adams v. Byerly, 123 Ind. 368.

The purpose of this suit was for an accounting and the right to redeem. This right, in the premises, the plaintiffs in error had.

Graffam v. Burgess, 117 U. S. 180; 29 Law Ed. 839.

The Constitution of the United States was a part of the obligation of this trust agreement from the date of its execution.

Rose v. Himely, 4 Cranch 241; 2 Law Ed. 608.
Tennessee v. Davis, 100 U. S. 257; 25 Law Ed. 648.
Strauder v. West Virginia, 100 U. S. 303; 25 Law Ed. 664.
In re Neagle, 135 U. S. 1; 34 Law Ed. 99.

In Louisiana v. Jumel, 107 U. S. 711; 27 Law Ed. 448, this court held that a holder of municipal bonds based upon certain public property were *cestuis que trust* and could sue upon a maladministration of the property which constituted their security. Many cases are reviewed in the opinion and their principles reiterated.

It will be observed that when the defendants came back into the case after the mandate they presented a pleading drawn upon the theory of a full and perfected performance of the trust agreements. That statement

was variously challenged with motions to make more specific, to strike out, etc., and with demurrer. The statement of full performance was essential to a good complaint under in the Indiana statute.

1 Burns R. S. 1914, Sec. 376.

Of course the counterclaim was false on its face because it exhibited the contracts and these contracts showed that they were to be performed *in pais* and if they had been so performed there could be no action brought for their further enforcements.

The purpose of the theory which they adopted was obviously to avoid the rule of *locus poinitentia* which is obligatory on one who has abandoned and, thereafter, wishes to reinstate his rights.

After the first decision by the Supreme Court of Indiana (185 Ind. 172), which fixed the obligation of the contract, the principle of *locus poenitentia* became effective against the defendants if they desired to reinstate their rights under the trust agreement. This principle was wholly disregarded by the defendants in error. They sued upon the contract as one which they had fully performed. This was a direct impairment of the obligation of the contract as fixed on the first appeal, and this federal question arises upon the record. See authorities *supra* as to obligation of contract and federal question. As to *locus poenitentia*, see:

Union Pac. v. Durant, 95 U. S. 576; 24 Law Ed. 391.

St. Louis, Etc. R. Co. v. Terre Haute, Etc. R. Co., 145 U. S. 393; 36 Law Ed. 748.

The Eliza Lines, 199 U. S. 119; 50 Law Ed. 115.

Harriman v. Northern, Etc. Co., 197 U. S. 244; 49 Law Ed. 739.

When the Supreme Court of Indiana refused to apply the law of the case in behalf of Dora E. Rooker and William V. Rooker, it acted not only in contraven-

tion of the contract clause of the Constitution of the United States, but also denied to them the equal protection of the laws and took their property without due process of law. (Vide authorities *supra.*) Where a Supreme Court's action invades a federal right, the federal question arises upon the record. (Vide authorities *supra.*) Then, the assignment of errors in this court tendered the Federal question expressly to the Supreme Court of the state in connection with the writ of error. That was in time. (Vide authorities *supra.*)

Saunders v. Shaw, 244 U. S. 317; 61 Law Ed. 1163.

SOME EXPOSITIONS UNDER THE SECOND OPINION.

From an examination of the record it would seem that the obvious purpose of the lease to West was to get these appellants in jail for contempt of court in violating the process and orders of the court, and this obvious purpose is disclosed in the matters which had occurred prior to the appellee's petition for the order to confirm the lease. These preliminary matters involve events in the record which appear chronologically as follows:

The statement of the Supreme Court of Indiana that the legal rights of the plaintiffs in error may be disregarded because, otherwise the defendants in error would be injured, never was the law. All the motions addressed to the counter-claim pointed out the remedy available to the defendants in error of the *quantum valebat.* "And where one party to a special entire contract has not fully complied with its terms, but professing to act under it, has done for, or delivered to, the other party something of value to him which he has accepted, no action will lie on such special contract, but the party who has accepted benefits thereunder from the labor of the other will be liable on an im-

plied promise arising from the circumstances to the extent of the value received by him. *Lomax v. Bailey* (1846), 7 Blackf. 599; *Coe v. Smith* (1848), 1 Ind. 267, 270; *Kerstetter v. Raymond* (1858), 10 Ind. 199; *Becker v. Hecker* (1857), 9 Ind. 497."

Scholz v. Schneek, 174 Ind. 186.

FEDERAL QUESTIONS UPON THE RECORD.

Where conflicting decisions of the Supreme Court of a state are rendered affecting the obligation of one and the same contract, and the second opinion with an express reference thereto makes the first opinion a part of the second opinion, a Federal question arises upon the record, where it appears that the second opinion impairs the obligation of the contract as fixed with the first opinion. In such case the Federal question appears upon the record and the case is excluded from that class of cases in which the Federal right, title, privilege or immunity must have been specially set up or claimed, to give this court jurisdiction.

Martin v. Hunter's Lessee, 1 Wheat 305; 4 Law Ed. 97.

Miller v. Nichols, 4 Wheat 311; 4 Law Ed. 578.

Wilson v. Blackbird, Etc. Co., 2 Pet 245; 7 Law Ed. 412.

Satterlee v. Matthewson, 2 Pet 380; 7 Law Ed. 458.

Crowell v. Randall, 10 Pet 368; 9 Law Ed. 458.

Bridge Proprietors v. Hoboken, Etc. Co., 1 Wall 116; 17 Law Ed. 571.

Furman v. Nichol, 8 Wall 44; 19 Law Ed. 370.

Murray v. Charlston, 96 U. S. 432; 24 Law Ed. 760.

Chicago, Etc. Co. v. Needles, 113 U. S. 74; 28 Law Ed. 1084.

Eureka, Etc. Co. v. Yuba, Etc. Ct., 116 U. S. 410; 29 Law Ed. 671.

Kaukana, Etc. Co. v. Green Bay, Etc. Co., 142 U. S. 254; 35 Law Ed. 1004.

Columbia, Etc. Co. v. Columbia, Etc. Co., 172 U. S. 475; 43 Law Ed. 521.

Yazoo, Etc. R. Co. v. Adams, 180 U. S. 1; 45 Law Ed. 395.

Speaking to the point that this court will examine the record to determine whether it presents within its own terms, as distinguished from a specific declaration by counsel, a Federal Question which will give this court jurisdiction it was said in Bridge Proprietors v. Hoboken, Etc. Co., 68 U. S. 116; 17 Law Ed. 571, Mr. Justice Miller, speaking the judgment of the court:

"It is objected, however, by the defendants, that the pleadings do not, in words say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the specific clause of the constitution supposed to render the act valid.

"It would be a new rule of pleading and one altogether superfluous to require a party to set out specifically the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and the defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact, without requiring the pleader to say in words: "This paragraph of the constitution is the one involved in this case."

Mr. Justice Brown, speaking for the court in Kaukana, Etc. Co. v. Green Gay, Etc. Co., 142 U. S. 254; 35 Law Ed. 1004, said: "This court has had frequent

occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court."

Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245.

Armstrong v. Athens County, 16 Pet 281.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574.

Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct., 116 U. S. 410.

This court will examine the opinion of the state court to learn whether a Federal question appears.

Kreiger v. Shelby R. Co., 125 U. S. 39; 31 Law Ed. 675.

This court will not permit an untenable opinion of the supreme court of a state, to defeat jurisdiction where the record shows that a Federal question exists.

Louisville Gas Co. v. Citizens Gaslight Co., 115 U. S. 683, 697; 29 Law Ed. 510, 515.

Terre Haute, Etc. R. Co. v. State ex rel Ketcham, 194 U. S. 579; 48 Law Ed. 1124.

Bradley v. Lightcap, 195 U. S. 1, 22-23; 49 Law Ed. 65.

This rule correlates with the principle that within its jurisdiction this court exercises an independent judgment in the determination of all questions which are not settled law.

Kuhn v. Fairmount Coal Co., 232 U. S. 349; 54 Law Ed. 229.

THE ART OF ALLOCATION IN THE SCIENCE OF JURISPRUDENCE.

Government is the art of discipline in social relations, and it depends, as all other things depend where order prevails, upon the art of allocation. This art is

juridical and it attends the functioning of jurisprudence. It is an art of great antiquity. We do not know its first demonstration, but in remote times there came to be allocated to the judiciary the virtue of integrity. Speaking to this point on the retirement of Mr. Justice Swayne from membership in this court on January 31, 1881, Attorney General Devens happily used these words:

"I have not spoken of his anxiety to do always what was just and right. Happily I stand before a tribunal which has endured nearly an hundred years, upon no member of which was there ever the imputation that he did not mean to deal justly and to do the right as it was given him to see the right. It was one of Mr. Justice Swayne's strongest characteristics. In the fine chapter of the Old Testament which describes the farewell of the aged Samuel to his people, ruler, priest and judge though he was, he desires to know, before he parts with his power to Saul if he has done wrong to any man, that he may rectify it. 'I am old and gray-headed,' says he 'but behold! here I am. Whose ox or whose ass have I taken? Whom have I defrauded? Whom have I oppressed? At whose hands have I received any bribes?' And the people answered: 'As God is our witness there is no such man.'"

"It is a fundamental principle that all tribunals clothed with judicial or *quasi* judicial functions shall be disinterested and unbiased in all matters brought before them. Any other rule or doctrine would be abhorrent to a natural sense of justice, and incompatible with judicial action. *Moses v. Julian* (1863), 45 N. H. 52; 84 Am. Dec. 114 and Notes. *Tootle v. Berkley* (1899), 60 Kan. 446; 56 Pac. 755. *Pearce v. Atwood* (1816), 13 Mass. 324. * * * Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.

This declaration has met with the approval of many American courts. Conant's Appeal (1907), 102 Me. 477; 76 Atl. 564; 120 Am. St. 512."

Metsker v. Whitesell, 181 Ind. 126, 137, 138.
Juliana v. Slate, 167 Ind. 421.
Winters v. Coons, 130 Ind. 16.
Waterman v. Morgan, 114 Ind. 237.
Chicago, Etc. R. Co. v. Summers, 113 Ind. 10.
Fechheimer v. Washington, 77 Ind. 366.
Leonard v. Blair, 59 Ind. 510.
Joyce v. Whitney, 57 Ind. 550, 554.
Hall v. Thayer, 105 Mass. 219; 7 Am. Rep. 513.
State ex rel Hocker, 34 Fla. 25; 15 South. 581; 25 L. R. A. 114.
Oakley v. Aspinwell (1850), 3 Const. (N. Y.) 547.
Ex Parte Virginia, 100 U. S. 339; 25 Law Ed. 676.

The action of Judge Ewbank, trustee of the Malott estate, in sitting in the Supreme Court of Indiana in this case, where the record contained in the evidence a reference to and the substance of the judgment of Judge Ewbank in the Circuit Court, rendered in the case between these parties and relating to the subject of this controversy, has a correlation in the Federal statutes and procedure.

American, Etc. Co. v. Jacksonville, Etc. Co., 148 U. S. 372, 378; 37 Law Ed. 486, 492.
Morgan v. Dillingham, 174 U. S. 153; 43 Law Ed. 930.

If Judge Ewbank were interested in an interpretation of the law to benefit his trust investments with the rule that a *cestui que trust* could not sue the trustee for malfeasance, nor to redeem the trust estate on repudiation by the trustee; or if he were interested in shielding himself by so fixing the laws of the state so that the *cestui que trust* of the Malott estate could not

hereafter sue the trustee, he was so interested as to be disqualified under the statute of Indiana, which allowed Dora E. Rooker and William V. Rooker to file their affidavit for a change of venue from him at the circuit.

1 Burns R. S., 1914, 422.

Had the proper affidavit showing Ewbank's interests, as a cause for change of judge, been filed and disregarded by the judge, his judgment would have been *coram non judice* and void. The plaintiff had the right and the duty to file an affidavit for a change from Ewbank had his disqualifications been known. Therefore, they are exposed to an essentially void judgment without fault on their part. In private transactions such concealment would be fraudulent and voidable. Is jurisprudence the shield of those wrongs which private life abhors?

Fechheimer v. Washington, 77 Ind. 366.

It is a misdemeanor in Indiana for a judge to participate in the practice of law. Sec. 2390, 1 Burns R. S., 1914, provides:

Sec. 2390. Whoever, being a judge of any Supreme, Appellate, Circuit, Superior or Criminal Court, directly or indirectly, practices law in any of the courts of this state, or gives counsel or advice in relation to any business in any court, or keeps an office for the transaction of any legal business, or for the purpose of giving counsel or advice in legal matters shall on conviction be fined not less than twenty-five dollars, nor more than five hundred dollars.

Justice v. Lairy, 19 Ind. App. 272.

SUMMARY OF FACTS.

It is obvious there would be no trust in this case except for Dora E. Rooker. Her life's work had been devoted to creating the estate with which she endowed this trust; she executed the deed; she went

into court to redeem the trust estate when it became obvious that the trust company's purpose was to convert the property to its own use; she was met with further acts of repudiation by the trustee when the deed was declared upon as a mortgage; she saw the adverse judgment and all that she possessed was seized and sold. Nor can it be said that the trust company thereupon meant to do by her the fair thing thereafter. After the adverse judgment upon which for slightly more than $20,000.00 the trust company acquired title to an estate of a minimum appraisement of $83,000.00, this same trust company sued her as assignee of the American Central mortgage. Possibly they wanted to get the family Bible, the beds, the cook stove and other articles of household furniture.

They have employed a former member of the Supreme Court, doubtless on a contingent basis of 50-50 to commercialize reputed confidences of the consultation room of the court to which he at one time belonged; they have got the support of a biased judge enlisted in their favor in Judge Ewbank.

They now have proceedings pending in the Hamilton Circuit Court which are a contempt of this court.

They have sought to cast Dora E. Rooker and William V. Rooker in jail because they asserted their interest in this trust estste. They will repeat that endeavor if they prevail here.

Yet in all this record they do not point out a single fact of wrong or delinquency on Dora E. Rooker's part. She simply believed in the laws of her country and submitted her cause to its institutions.

There are large elements in mankind which are opposed to the judicial function; they believe in community rights; that where allocation has been made it should be destroyed. These men call themselves variously socialists, communists, anarchists and the soviet.

Where order has prevailed they demand that it shall be destroyed.

In jurisprudence our institutions require that where allocation has once been made it creates a status which shall be preserved. Therefore, we have it that when a Supreme Court has once determined a controversy and fixed a status for each of the parties, there has been created an allocation which endures forever to control the situation as it was determined. This quality distinguishes us from the soviet and his ilk.

If that allocation is violated the offender may be punished for larceny, trespass, murder or whatever form of offense the wrong may involve. This condition distinguishes the lawabiding citizen from the wrongdoer and the criminal.

To facilitate the preservation of an allocation once judicially made, we have coined such phrases as "the law of the case" and "res adjudicate." We say that when an instrument has once gone to adjudication it is merged in the judgment and exists no longer to be performed *in pais* or to be made actionable upon subsequent conduct. We go farther than that and say that in the premises there remains nothing which thereafter may become the basis of a jurisdiction *de novo* and that where a court attempts to assert a new authority over an instrument which has merged, the new proceedings are *coram non judice* and void.

So in this case we have the two broad courses open to us. The one preserves the art of discipline, the other destroys it and leads to ends which are lawless and godless and destructive of social order.

A conscious knowledge of all this is apparent in the second opinion of the Supreme Court of Indiana.

Where we told them that no valid counter claim could be written which would be germane to the issue they denied the issue and they turned back to the contract as if it stood in its virgin state unaffected with

merger in a judgment. But that judgment had become the law of both the contract and of all issues upon the contract. There remained no actionable right subsequent to the original issue. The denial of that judgment impaired the obligation of the contract, denied the equal protection of the law to plaintiffs in error and took their property without due process.

And so the Supreme Court in its second opinion proceeded: It affirmed the overruling of a demurrer which charged that the second amended counter claim of defendants in error, as supplemented contravened the first opinion of the Supreme Court.

It affirmed the defeat of special answers which expressly averred that particular items were beyond the original issue and could not be adjudicated now.

It affirmed the overruling of the motion for judgment which challenged the legality of the special findings as being beyond the issue of the mandate, and said that the motion was "unknown to our practice," notwithstanding it is a rule of great antiquity and frequent use in Indiana, and upon the adoption of the Code in 1852 was preserved with a statute.

It affirmed the denial of exceptions to conclusions of law which expressly challenged the conclusions as being in contravention of the former opinion of the Supreme Court.

It affirmed the overruling of the motion for new trial which challenged the special findings as being contrary to the law of the case.

It affirmed a judgment which denied to these plaintiffs in error any interest in their trust estate and enjoined them from asserting as unlawful that interest which the Supreme Court on the first appeal adjudged to be lawful.

It did all this with the participation of a judge who was disqualified with (1) a conflicting official duty,

(2) a conflicting personal interest and (3) a judicial interest in the record under examination.

In the premises the two ways are open. The one is unlawful, infamous and godless. The other conserves public discipline and the respect of judicial order.

There can be no doubt that this court will pursue the proper way and remand the cause with an order to sustain the motion for judgment on the special findings and grant such relief as may be proper.

Respectfully submitted,

WILLIAM VELPEAU ROOKER,
Attorney for Plaintiffs in Error.

FLOYD G. CHRISTIAN,
RALPH H. WALTZ,
Of Counsel.

Received copy of this brief this_____day of February, 1923.

_____

Attorney for Defendants in Error.

Office Supreme Court, U. S.
FILED
MAY 15 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

~~No. 684 October Term 1921~~

~~ON~~ 280

LAW NO. 785 OCTOBER TERM 1921

ON WRIT OF ERROR

PETITIONERS' MOTIONS FOR RULES TO SHOW CAUSE IN RE CONTEMPT OF COURT

DORA E. ROOKER — WILLIAM V. ROOKER

Petitioners and Informants

VS.

FIDELITY TRUST CO., in its Corporate Capacity Proper
FIDELITY TRUST CO., as trustee of the Estate of Dora E. Rooker
WILLIAM M. FOGARTY
JAMES McNULTY
J. ALBERT SMITH
JAMES G. FLAHERTY
TRIANGLE REALTY CO.
HENRY SEYFRIED
CHARLES E. COX
FRED E. HINES
JUDSON D. MOSCHELLE
ANNA K. MOSCHELLE
AMO BUCK
GRANT CACA
RAYMOND CACA
THOMAS WEST
LEE WEST
HENRY WEST

Respondents

FLOYD G. CHRISTIAN,
RALPH H. WALTZ,
of Counsel.

WILLIAM VELPEAU ROOKER
Attorney for Petitioners and Informants.

LEVEY, IND'PLS.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 634 October Term 1921

ON PETITION FOR CERTIORARI

No. 785 October Term 1921

PENDING ON WRIT OF ERROR

DORA E. ROOKER, ET AL

Petitioners and Informants

VS.

FIDELITY TRUST CO., etc. ET AL

Respondents

PETITIONERS' AND INFORMANTS' MOTIONS FOR RULES TO SHOW CAUSE IN RE CONTEMPT OF COURT

MOTION OF DORA E. ROOKER AND WILLIAM V. ROOKER FOR A RULE AGAINST FIDELITY TRUST COMPANY IN ITS CORPORATE CAPACITY PROPER AND FIDELITY TRUST COMPANY AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER TO SHOW CAUSE WHY THEY SHOULD NOT BE COMMITTED FOR CONTEMPT OF THIS HONORABLE COURT.

MOTION OF DORA E. ROOKER AND WILLIAM V. ROOKER FOR A RULE AGAINST FIDELITY TRUST COMPANY IN ITS CORPORATE CAPACITY PROPER; FIDELITY TRUST COMPANY AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER; WILLIAM M. FOGARTY; JAMES MCNULTY; J. ALBERT SMITH; JAMES G. FLAHERTY; TRIANGLE REALTY COMPANY; HENRY SEYFRIED; CHARLES E. COX; FRED E. HINES; JUDSON D. MOSCHELLE; ANNA K. MOSCHELLE; AMO BUCK; GRANT CACA; RAYMOND CACA; THOMAS WEST; LEE WEST AND HENRY WEST.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

I

Your petitioners Dora E. Rooker and William V. Rooker move the Court for a rule against Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as trustee of the estate of Dora E. Rooker to appear before this Honorable Court at a time to be appointed by the Court and show cause if any there be why they and each of them should not be committed for contempt of this Honorable Court upon the premises hereinafter stated and that upon such rule said respondents be required to make restitution of property by them taken and converted, to answer as to the damages sustained by Dora E. Rooker and William V. Rooker in the premises and that said damages be assessed by this Honorable Court and that upon such assessment that an order of commitment be made and entered against said respondents and each of them until they and each of them shall have complied with, discharged and performed the order of the Court in the premises and that such other and further relief may be granted these petitioners as to a Court of Equity may seem to be proper and just and that notice accordingly be issued and directed to and served upon respondents each of them, in the form and manner provided by law.

II

Your petitioners and informants Dora E. Rooker and William V. Rooker move the Court for a rule against Fidelity Trust Company in its corporate capacity proper, Fidelity Trust Company as trustee of the estate of Dora E. Rooker, William M. Fogarty, James McNulty, J. Albert Smith, James F. Flaherty, Triangle Realty Company, Henry Seyfried, Charles E Cox, Fred E. Hines, Judson D. Moschelle, Anna K. Moschelle, Amo Buck, Grant Caca, Raymond Caca, Thomas West, Lee West and Henry West to appear before this Honorable Court at a time to be appointed by the Court and show cause, if any there be why an attachment should not issue against them and each of them for contempt of this Honorable Court upon the premises hereinafter stated and that upon such rule said respondents be required to appear and answer, or to suffer default at their peril and that a hearing be had and that upon

such hearing said respondents be adjudged guilty and that they be punished in such form and manner as to this Honorable Court may appear lawful and just and that notice accordingly be issued and directed to and served upon said respondents and each of them in the form and manner provided by law.

III

And for cause in respect of their motion for a rule to show cause why an order of commitment for contempt should not be made, these petitioners Dora E. Rooker and William V. Rooker say that they are the petitioners in cause No. 634 October Term, 1921, pending in this Honorable Court on petition for certiorari; also, that they are plaintiffs in error in cause No. 785 October Term, 1921, likewise pending on writ of error to the Supreme Court of Indiana.

And they further say that said Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as trustee of the estate of Dora E. Rooker are respondents in said cause No. 634 October Term, 1921, and that they are defendants in error in said cause No. 785 October Term, 1921.

IV

And for cause in respect of their motion for a rule to show cause why an order of attachment for contempt should not be made, these petitioners Dora E. Rooker and William V. Rooker say that they are petitioners in cause No. 634, October Term, 1921, pending in this Honorable Court on petition for certiorari; also, that they are plaintiffs in error in cause No. 785, October Term, 1921, likewise pending on writ of error to the Supreme Court of Indiana.

And they further agree that for purposes of their own and seeking how they might injure these petitioners and informants in their persons, in their good names, in their rights of property and how they might delay, obstruct and injure these petitioners and informants in the exercise of their right to address their proper suits to this Honorable Court for the redress of wrongs grievously inflicted upon them by the Hamilton Circuit Court of Indiana, wrongfully and unlawfully conspired, confederated and agreed together and with each and all their several co-respondents hereto to imprison these petitioners upon unjust and unlawful charges and false accusations; to affect and

change the status of the subject matter of this litigation; to anticipate and forestall the judgment of this Honorable Court and defeat its efficiency and the premises and therefore said respondents above named agreed, conspired and confederated together to do and they did do the acts and each of them ascribed to said respondents upon the record and in the recitals following, to-wit:

V

CHRONOLOGY OF THE SUBSEQUENT PROCEEDINGS

Stating these proceedings in their chronological order, the events were as follows:

On October 26, 1921, the Clerk of the Supreme Court of Indiana filed in the office of the Clerk of the Hamilton Circuit Court of Indiana, a certified copy of the opinion, judgment and mandate of said Supreme Court which opinion, omitting the caption and the clerk's certificate, was as follows:

SECOND JUDGMENT OF THE SUPREME COURT

WILLOUGHBY, J. This case is a resumption of proceedings under the mandate of this court in Rooker v. Fidelity Trust Co., 185 Ind. 172, 109 N. E. 766. The appellants, as settlers of a trust in lands, sued appellee, who was the trustee, alleging a violation and repudiation of the trust and demanding damages, an accounting, that the appellee trustee be removed, and that a receiver be appointed for the trust estate to administer it under the terms of the trust agreement. Appellee on its part filed a cross-complaint in which it set up the same trust and its duties under it as trustee, its performance of all its duties save the sale of the trust estate, its reason for not making such sale, its purpose to carry out the sale, and its hindrance by appellants' interference and claim of title. It asked an accounting that its title as trustee be quieted, that appellants be enjoined, and that it be decreed to make sale pursuant to the trust agreement and distribution of proceeds accordingly.

Appellants' complaint was answered by appellee trustee by general denial. Issue was formed on the cross-complaint of appellee trust company by answer of general denial and by special partial answers; the issues on the latter being made by replies in general denial. On these issues the cause

was submitted to the court for trial, and the following special finding of facts and conclusions of law were made and stated by the court:

The court finds the facts to be:

First. That on and prior to the 11th day of October, 1909, the plaintiff, Dora E. Rooker, was the owner in fee simple of certain real estate situate in Hamilton county, Indiana.

Second. That on and prior to the 11th day of October, 1909, the plaintiffs William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entireties, of certain real estate situate in Marion county, Indiana.

Third. That on the said 11th day of October, 1909, said plaintiffs Dora E. Rooker and William V. Rooker, her husband, executed and delivered to said cross-complainant, Fidelity Trust Company, as trustee, their warranty deed for the lands in Hamilton county:

" * * * To have and to hold said real estate, however, in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of liens by reason of improvements made on the above-described real estate.

"Said Fidelity Trust Company of Indianapolis, Ind., as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker, to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser, it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, trustee.

"And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make

contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate, and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this grantor, the mortgagee, and other lienholders in and to said real estate and to conserve the trust hereby created.

"And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, trustee, the said Fidelity Trust Company, trustee, shall be subrogated to all the rights of such original lienholders and the same shall be enforceable by it and collectible with interest at the rate of 6 per cent. per annum, to be credited semi-annually as a debit and charge against said real estate.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19, 1908, said mortgage secured the payment of certain principal note of said grantor in the sum of fourteen thousand ($14,000) dollars, together with interest thereon and recorded in Mortgage Record 52, page 84, in the office of the recorder of Hamilton county, Ind."

That said indenture by Dora E. Rooker and William V. Rooker, her husband, was received for record on the 14th day of October, 1909, and recorded in Record 97, at page 117, in the recorder's office of Hamilton county, Ind.

Fourth. That on said 11th day of October, 1909, the plaintiffs William V. Rooker and Dora E. Rooker, husband and wife, executed and delivered to said cross-complainant Fidelity Trust Company, as trustee, their warranty deed for the lands in Marion county:

" * * * To have and to hold said real estate, however, in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

"Said Fidelity Trust Company of Indianapolis, trustee

as aforesaid, to sell and convey said real estate according to the terms of a certain contract of even date herewith within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days' notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell the same at public or private sale at such price as it may bring, and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers, it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

"The said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created, and it is hereby further understood and agreed that, if the said Fidelity Trust Company of Indianapolis, as trustee, shall elect to pay any lien, charge, or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, trustee, shall be subrogated to all the rights, title, and interest held by the

original parties thus paid, and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of 6 per cent. per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to certain mortgage executed March 12, 1909, by the grantors, William V. Rooker and Dora E. Rooker, husband and wife, to the Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of six thousand ($6,000) dollars and interest coupon notes thereon which mortgage is recorded in Mortgage Record 523, page 128, in the office of the recorder of Marion county, state of Indiana."

That this indenture was received for record on the 14th day of October, 1909, and recorded in Record 52, page 101, in the office of the recorder of Marion county, Ind.

Fifth. That contemporaneously with the execution of the two warranty deeds executed on the 11th day of October, 1909, to said Fidelity Trust Company, trustee, and as part of the same transaction, the plaintiffs Dora E. Rooker and William V. Rooker, as first parties, and the defendant and cross-complainant, Fidelity Trust Company of Indianapolis, Ind., as second party, executed in duplicate on the 11th day of October, 1909, a memorandum or contract in writing. (This memorandum or contract in writing is set out in full in the opinion in Rooker v. Fidelity Trust Co., 185 Ind. beginning on page 173, 109 N. E. 766.)

Sixth. That since the execution of said warranty deeds and said written memorandum the plaintiff, Dora E. Rooker has continued in the possession of and farmed all the lands situated in Hamilton county, Ind., and is now in possession thereof, and that the plaintiffs William V. Rooker and Dora E. Rooker, have continued in the possession of and farmed all of the real estate situated in Marion county, Ind., and are now in possession thereof.

Seventh. That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff, Dora E. Rooker, has received all of the pro-

ceeds arising out of the Hamiton county real estate, and has not at any time rendered an accounting to the Fidelity Trust Company, trustee, and the plaintiffs, William V. Rooker and Dora E. Rooker, have received the proceeds arising out of the Marion county real estate and have not at any time rendered an accounting to the Fidelity Trust Company, trustee.

Eighth. That Fidelity Trust Company, trustee, has not sold or conveyed any of the real estate conveyed to it by plaintiffs, and that the title of the same is now in the said Fidelity Trust Company, trustee, and that said Fidelity Trust Company is not claiming or asserting any other title than the title and right set forth in the deeds of conveyance and memorandum of trust, hereinbefore set out in these findings.

Ninth. That prior to the commencement of plaintiff's action, namely, on or about the 28th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company, trustee, served a written notice upon the plaintiffs demanding the payment of certain sum aggregating $19,-604.04, and tendered for delivery its quitclaim deeds conveying and quitclaiming said Hamilton county and Marion county lands to the original grantors upon the payment of the aforesaid sum upon demand and stating that said quitclaim deed will remain in the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the demand.

Tenth. That the plaintiff, Dora E. Rooker, in the constructing of her dwelling house on the Hamilton county land, contracted large liabilities to various persons, firms, and corporations for work and labor done and material furnished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said Fidelity Trust Company, trustee, under said contract and upon the security evidenced by said two separate warranty deeds and agreement of trust, all executed and delivered October 11, 1909, did from time to time thereafter upon the written order and direction of the plaintiff, Dora

E. Rooker, first pay out the total sum of $6,000, and did further, after paying on the written order and direction of said Dora E. Rooker the total sum of $6,000, let out and expend a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the plaintiff, Dora E. Rooker, issued from time to time to the defendant and cross-complainant, Fidelity Trust Company, directing the payment of certain obligations showing on their face the nature of the claim, the amount thereof, and the party to whom payment should be made, and that the signature affixed thereon is the signature of the plaintiff, Dora E. Rooker.

Eleventh. That said Fidelity Trust Company made payment on such written orders issued from time to time by plaintiff, Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff, Dora E. Rooker, and receipted by the respective parties in whose favor the voucher is drawn aggregating the sum of $15,813.21.

Twelfth. The said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts, aggregating the sum of $21,194.27.

Thirteenth. That no assets came into the possession of the trustee other than lands described, and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Ind., a corporation engaged in the business of operating a trust company under the laws of the state of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

Fourteenth. That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, trustee, is entitled to have and receive for its compensation, a trustee's fee of $150, which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of 2 per cent. on loans and advancements and all moneys laid out and expended, of which $120 has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant

is further entitled to have and receive interest on all moneys loaned or advanced at the rate of 6 per cent. per annum.

Fifteenth. That the plaintiffs are entitled to the following credits, to-wit: $95, together with interest thereon at 6 per cent. from October 16, 1909, on account of the cancellation of insurance policy of $6,000, said sum having been charged against plaintiffs under order and voucher dated October 16, 1909; also a credit of $500, with interest at 4 per cent. from August 26, 1910, less $15 deducted from the principal amount as a premium upon the surety company bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company as collateral on a supersedeas in the case of William V. Rooker and Dora E. Rooker v. Ludowici Celadon Co. in the Appellate Court, which cause was affirmed on appeal, 53 Ind. App. 275, 100 N. E. 469, and upon the judgment being paid said security of deposit returned; also a rebate of $402.81 representing the various amounts of penalties and costs, including various payments for taxes on the Marion county lands.

Sixteenth. There is now due and owing to the defendant and cross-complainant herein from the plaintiffs cross-defendants herein the principal sum of $37,007.48, and for the interest thereon the aggregate sum of $14,271.29, and for commission at 2 per cent. on all funds paid out in excess of $6,000 the aggregate sum of $620.14, from which there shall be deducted the aggregate sum of $982.18, together with interest thereon amounting to $218.51, being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein in the sum of $50,697.59.

Seventeenth. That all the amounts advanced and paid out by the defendant, Fidelity Trust Company, trustee, as hereinbefore set out, were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate, and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker and her separate estate, and were received by her and applied for such purpose, and said Fidelity Trust Company, trustee,

is entitled to reimburse itself therefor according to the terms of said agreement by the sale of said lands therein provided.

Eighteenth. That on the 21st day of June, 1917, the defendant, Fidelity Trust Company, as trustee, served a notice upon William V. Rooker and Dora E. Rooker of which the following is a copy:

"To William V. Rooker and Dora E. Rooker:

"Pursuant to the provisions of the deed of conveyance executed to the undersigned as trustee on the 11th day of October, 1909, conveying to the undersigned as trustee the following described real estate in Marion county, state of Indiana, to-wit: The southeast quarter of the northeast quarter of section 33, township 17 north, range 4 east, containing 40 acres more or less; also the southwest quarter of the northwest quarter of section 34, township 17 north, range 4 east, containing 40 acres, more or less—and the memorandum executed concurrently therewith, notice is hereby given that the Fidelity Trust Company as trustee, will ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the purchaser.

"Dated at Indianapolis, Ind., this 21st day of June, 1917.

"Fidelity Trust Company, Trustee,
By W. M. Fogarty, President.

"Attest: James G. Flaherty, Secretary."

Nineteenth. That after the execution of said deeds of conveyance and written memorandum set forth in paragraphs of this finding designated third, fourth, and fifth, and prior to the demand for repayment and tender of deed of reconveyance set forth in the ninth paragraph of this finding, the plaintiff, William V. Rooker, acting for himself and his wife and coplaintiff, Dora E. Rooker, did on several occasions express and convey to defendant, the Fidelity Trust Company, their intentions to pay off the advancements, more specifically set forth in this finding, there-

tofore made by it under said deeds and memorandum and take reconveyance of said land, and otherwise by their course and conduct did induce said demand for repayment and tender of reconveyance.

Twentieth. That said Fidelity Trust Company, trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said trust agreement hereinfore set out, but that said Marion county lands were not sold within one year after the execution of said memorandum and deeds, and have not yet been sold by said trustee under said trust provisions. That 90 days' notice in writing was given, as set forth in the previous findings, notifying the plaintiffs of the proposed sale of said Marion county lands under said trust agreement. That the plaintiffs have been, were then, and are now asserting an interest in said lands adverse to the rights of said trust company, as trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton county lands adverse to the right of the said trust company as trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above. That the plaintiffs, in open court, have disputed and now deny the right of the said trust company, as trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and now are resisting the sale of said lands or any of them by said trustee, and are now prosecuting an appeal in the Appellate Court from a judgment of the Marion County Circuit Court quieting the title of the Marion County lands in said Fidelity Trust Company as trustee, and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as trustee to said Marion county lands and from denying, disputing, obstructing, or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust. That the assertion of interest in said lands by plaintiffs as hereinabove stated adverse to the interest of Fidelity Trust Company as

trustee under said trust agreement is unfounded and without right.

Upon the foregoing facts the court states the following conclusions of law:

(1) The law is with the defendant on the issues joined on plaintiff's complaint.

(2) The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

(3) The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant, Fidelity Trust Company, trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

(4) The defendant and cross-complainant, Fidelity Trust Company, is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

(5) The defendant and cross-complainant is entitled to judgment on account in the sum of $50,697, to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

(6) The defendant and cross-complainant is entitled to recover its costs in this action taxed at $———.

The court, having found the facts specially and stated its conclusion of law thereon, now renders judgment accordingly.

It is therefore considered, ordered, adjudged, and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

It is further considered, ordered, adjudged, and decreed that the defendant and cross-complainant, Fidelity Trust Company, has not mismanaged, repudiated, or abandoned its trust, but has faithfully performed its duties as trustee

under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations as such trustee by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement, and not otherwise, and in no other capacity; that said defendant and cross-complainant, Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee-simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen (18), township eighteen (18) north, range five (5) east, lying west of the Lake Erie & Western Railroad, containing ninety-two (92) acres more or less.

"Also the southwest quarter of section seven (7), township eighteen (18) north, range five (5) east, lying west of the Lake Erie & Western Railroad and east of White river, containing forty-eight (48) acres, more or less.

"Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White river.

"Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods more or less to White river; thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence

north 115.20 rods to the place of beginning—containing seventy-five (75) acres, more or less, situated in Hamilton county, Ind.

"And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres more or less situated in Marion county, Ind."

It is further considered, ordered, adjudged, and decreed that said Fidelity Trust Company, trustee, is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of $50,697.

It is further considered, ordered, adjudged, and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents, and profits thereof, and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker, under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee, is wrongful, without right, and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be, and they are, each and both hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession, use, and rents and profits thereof, and from denying, disputing, obstructing, or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing,

or obstructing said trustee or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands as aforesaid.

It is further considered, ordered, adjudged, and decreed that said Fidelity Trust Company, as such trustee, proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above-described lands, convey the same by warranty deeds in fee simple, and put the purchaser or purchasers thereof, in possession; that said Marion county lands having failed to sell for the sum of $18,000 in the first year after the execution of said deeds and trust agreement or thereafter, said trustee, having given the written notice to said plaintiffs and the notice by public advertisement provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion county lands above described forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that, if said Marion county lands do not sell for lack of a bid, then said trustee shall, after giving said plaintiffs 90 days' notice in writing of their intention to do so, sell and convey said Hamilton county lands for whatever sum they will bring over and above the upset price of $65,000; that, if said Hamilton county lands do not sell for said sum of $65,000 for lack of a bid for that sum, then said trustee, after 90 days' notice in writing, to the plaintiffs of their intention to do so, shall sell said Marion county lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that, if upon any sale of the Marion county lands under this decree they do not fetch enough to pay the moneys and perform the obligation against said trust estate in this action found to exist and to be due, then said trustee shall, after giving 30 days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey, said Hamilton county lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor; that any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

It is further considered, ordered, adjudged, and decreed

that, when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

(1) To the payment of the costs of this action.

(2) To the payment of any mortgage or other valid liens, charge, adverse interest, or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, trustee.

(3) To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of $50,697.

(4) To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

(5) The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators, and assigns.

From this judgment and decree appellants appeal, and allege errors relied on for reversal as follows:

(1) In overruling motions to strike out the appellee's second amended counter claim.

(2) In overruling the demurrers to the second amended counter claim for insufficiency of facts.

(3) In overruling motion to make second amended counter claim more specific.

(4) In overruling appellants' motion for judgment on the special findings.

(5) The trial court erred in its conclusions of law.

(6) In overruling appellant's motion to modify the judgment.

(7) In overruling appellants' motion for a new trial.

The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter claim and cross-complaint of appellee. An examination of the record discloses that the pleading to which reference is here made was appellee's cross-complaint as amended after he decision of this court in the case of Rooker v. Fidelity Trust Co., 185 Ind. 172, 109 N. E. 766.

The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court in this case and the exhibits attached to said cross-complaint no sufficient cross-complaint or counter-claim could have been written against appellants. This phase of the case need not be discussed in disposing of these motions, for it is settled law that error cannot be predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading. Woodhams v. Jennings, 164 Ind. 555, 73 N. E. 1088; Pfau v. State ex rel., 148 Ind. 539, 47 N. E. 927.

In support of their second alleged error appellants claim that the appellee trust company could not in any event by counter claim sue the appellants on the subject-matter of the trust estate on the facts set up in the counter claim for the reason that the counter claim is not relevant or germane to the complaint.

The arguments presented by appellant in favor of their demurrers are in substance that the appellee was guilty of wrongful management of the trust property and sought to acquire title to it by wrongdoing, and that the trustee elected to repudiate the trust agreement and have the trust deed declared a mortgage, and that by reason of having failed to succeed the rights of the trustee were lost, and it has no right to recover the sums of money expended by it for the use and benefit of the appellants.

A counter claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant or which would tend to reduce the plaintiff's claim or demand for damages. Burns' 1914, 355.

A counter claim is good and germane to the principal case if it alleges matters connected with the subject of the original action. Standley v. N. W. Ins. Co., 95 Ind. 254; Excelsior Clay Works v. De Camp, 40 Ind. App 26, 80 N. E. 981.

A counter claim under Code provisions like ours is the equivalent of the cross-bill in equity, and in addition includes common-law recoupment. Woodruff v. Garner, 27 Ind. 4, 89 Am. Dec. 477.

The purpose of a cross-bill is to obtain full relief for all parties and a complete determination of all controversies which arise out of the matters charged in the original bill. 10 R. C. L. p. 483, § 261 et seq.

In this case, the transaction having been brought into a court of equity by appellants, it was not only the right of the court to entertain a cross-bill which would settle all the rights of all the parties in all of their relations in the subject-matter, but it was the duty of the court, if necessary, to require a cross-bill to be filed which would enable it to completely settle the controversy. See Sims v. Burk, 109 Ind. 214, 9 N. E. 902.

A party who imagines he has two or more remedies or who misconceives his rights is not deprived of all remedy because he first tries a wrong one. Bunch v. Grave, 111 Ind. 351, 12 N. E. 514; Nave v. Powell, 62 Ind. App. 274, 110 N. E. 1016.

The doctrine of election of remedies is of equitable origin. It has no application to the circumstances of this case, for to apply it here would work to the great harm and loss of the appellee trust company, and the unearned and undeserved large money benefits to appellants. Moreover, it does not apply unless in fact two remedies are available, which is not true in this case, as the Supreme Court has decided in 185 Ind. 172, 109 N. E. 766. The court did not err in overruling the demurrers to the second amended counter claim.

In support of their third alleged error the appellants argue at length that the counter claim was illegal. The object of a motion to make a pleading more specific is to require the pleader to state with certainty what is vaguely stated in the pleading. Elliott's App. Proc. § 665; Falley v. Gribbling, 128 Ind. 110, 26 N. E. 794.

The appellee in its counter claim set up very fully and in circumstantial detail the trust and its relation to it, and its title and doings as trustee, and the items of its account and the circumstances requiring the aid of the court in finally carrying out and closing the trust. There is no uncertainty or vagueness of statement, and it is not claimed by appellants that there is. Their motion is based on what they call the

illegality of the claim. The court did not err in overruling their motion to make more specific.

The fourth error relied on for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment on a special finding of facts is not recognized by our practice. It is elementary that the sufficiency of the evidence to sustain the finding is raised by a motion for a new trial, and that questions of fact raised by the conclusions of law stated on a finding can be presented only by exceptions taken to the conclusions of law. The court did not err in overruling appellants' motion for judgment on the special finding of facts.

It appears from the record that, after the court filed its special finding of facts and conclusions of law thereon, the plaintiffs each respectively moved the court for judgment in their favor on the special finding of facts, and when such motions were overruled they excepted to the conclusions of law. Under such circumstances the exceptions are not available.

Exceptions to conclusions of law upon facts specially found must be taken before the taking of any other step in the cause by the excepting party. Dickson et al. v. Rose, 87 Ind. 103. See, also, Barner v. Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502; Chicago R. R. v. State ex rel., 159 Ind. 237, 64 N. E. 860; Medical College v. Commingore, 140 Ind. 296, 39 N. E. 744.

Though it was taken on the same day that the ruling was made, an exception will not be available if it was not taken until after additional steps in the prosecution or defense of the case had been taken by the party reserving it. Ewbank's Manual (2d Ed.) § 24b; Dickson v. Rose, 87 Ind. 103; Barner v. Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502.

The correctness of the conclusions of law cannot be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. Chicago & S. E. Ry. Co. v. State ex rel., 159 Ind. 237, 64 N. E. 860. The judgment rendered in this case was in conformity with the conclusions of law.

The seventh error relied on for reversal by appellants is that the court erred in overruling their motion for a new trial. In support of their contention to show that the court erred in overruling said motion the appellants say that the cause was put at issue and tried on an unlawful cross-complaint, and that, therefore, the judgment was contrary to law. This contention was decided adversely to appellants in our ruling on the demurrers to the cross-complaint and counter claim. The brief of appellants does not contain a condensed recital of the evidence in narrative form as required by the rules.

A statement of the evidence mixed with statements and arguments of counsel, propositions of law, and citation of cases, and which clearly does not purport to cover the entire evidence, does not comply with the rules of this court, and does not command a consideration of a motion for a new trial involving the evidence. Rose v. City of Jeffersonville, 185 Ind. 577, 114 N. E. 85, and cases there cited. No question is presented on the sufficiency of the evidence.

No reversible error is shown in the record.

Judgment affirmed.

THE MOTION TO COMMIT AND FOR WRIT OF ASSISTANCE

On November 16, 1921, the Judge, Fred E. Hines, in the Hamilton Circuit Court made the following entry: "Comes now the defendant in the above entitled cause and moves the Court to re-docket said cause, which Motion is granted and said cause is now re-docketed and said defendant now files therein its verified information and petition for an order to the plaintiffs therein, Dora E. Rooker and William V. Rooker, to appear in the Court and before the judge thereof to show cause why, if any there be, they and each of them should not be punished for contempt of this Court by violating the decree of injunction heretofore entered in said cause, and that said judgment and decree of this Court heretofore entered in this cause be carried into effect, and praying for a writ of assistance to put defendant in possession of the real estate involved, which Motion and petition, [omitting the caption,] was as follows:

"The Fidelity Trust Company, Trustee, defendant and cross-complainant in the above entitled cause, respectfully shows to the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiffs' complaint and upon defendant's counterclaim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counterclaim and cross-complaint; that this court, on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee then held the legal title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

"All of the west half of the north half of section eighteen (18), township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres, more or less.

"Also the southwest quarter of section seven (7), township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

"Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

"Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence

south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

"And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less, situated in Marion County, Indiana.

"It was, in said judgment and decree, further adjudged and decreed that this defendant was then and there entitled to judgment on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

"It was further in said judgment and decree adjudged and decreed that said plaintiffs had then parted with all their title to said real estate, and the appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof, and that they had no interest therein other than an interest in the proceeds of the sale of said real estate contingent wholly upon a sale thereof at such a price that, after the payment of costs, liens, said judgment on account for $50,697 and the further reimbursement of said defendant trustee of such sum or sums as might accrue to it in the execution of said trust, an unappropriated sum might still remain in defendants' hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds, aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and obstructive of the completion of the execution of said trust by said defendant and that said plaintiffs were then and there and thereby, each and both perpetually enjoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give

possession and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands.

"It was further, in said judgment and decree, ordered, adjudged and decreed that said defendant, trustee should proceed, under the terms of the deeds and trust agreement under which it held title, to sell said lands and to proceed and first make sale of said Marion county lands and later to make sale of said Hamilton county lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or disapproval.

"Said judgment and decree further directed the application of the proceeds of such sales.

"And defendant further avers, that at the conclusion of the hearing and trial of said cause and before the finding and judgment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered by the agreement of the parties to said action, plaintiffs and defendant, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton County lands and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn, and to collect the proceeds and apply and distribute the same under the direction of the court; that said trust company did appear in open court on said day and did accept said trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from said trust.

"And defendant further avers that said plaintiffs filed in the Supreme Court of Indiana a vacation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issued staying execution on said judgment and that the same has been and remained in full force and effect and is now; that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and that thereafter plaintiffs filed a petition for a rehearing

thereof which was on October 12, 1921, in all things overruled and said judgment became absolutely final.

"And plaintiff further avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure a purchaser and to sell said Marion county real estate that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, of Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court that such exceptions and objections were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay of proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained and is now in full force and effect; that defendant did, pursuant to said order execute its deed by delivering to said Triangle Realty Company and received the consideration of said sale, towit, the sum of $16,000.

"And defendant further avers that notwithstanding the aforesaid judgment and decree of December 21, 1918, said plaintiffs, Dora E. Rooker and William V. Rooker, have at all times since claimed to be the owners of said real estate and entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendant; that without right and without the knowledge of this defendant and without the knowledge or approval of the court, said plaintiffs procured said Wainwright Trust Company, receiver as aforesaid to make leases to one West for the crop, years 1919 and 1920, of the tillable parts of said Hamilton county lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amount and value of which are at this time unknown to defendant, and did deliver one-half thereof to said Dora E. Rooker and

said William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that said plaintiffs unlawfully and in violation of the decree of this court converted said crops to their own use; that in the year 1920 said plaintiffs without the knowledge of defendant or this court took the rental of said Hamilton county lands out of the hands of this court's receiver, said Wainwright Trust Company and themselves rented the same to one Thomas West for a grain rent for the crop year of 1921 providing therein that he should deliver the landlords share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one-half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921, produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlord's share thereof fifty tons of the value of $600.00 which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3,000 bushels of corn of the net value of $1,000 of which plaintiffs are claiming one-half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threatening said West with legal action if he does not comply with such demands and are seeking by threats and intimidation to prevent him from gathering his share of said corn if he does not so comply.

"And defendant further avers that at the time of the sale of said Marion county land in 1919 as aforesaid there was then on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlord's share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it of all of which said tenant was then and there informed by defendant; that said

plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's share of said crops, and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant, and to hold possession thereof as such and to deliver to them the landlords share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of , 1921, continued to do; that in the years 1919, 1920 and 1921, said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of 1921, said purchaser received possession of said lands and put its own tenant in possession thereof whereupon, on the day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant, was a trespasser on said premises and that he, Rooker was the owner thereof with the right to the possession and use thereof.

"And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held possession of the dwellings and other appurtenances of said Hamilton county lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust and except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against

said lands, including taxes, insurance, etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiffs conduct and the depreciation of said property it can not now be sold at a price which will pay the costs and expenses and reimburse it fully for its outlay and interest.

"And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton county lands and appurtenances which demand was refused by them and they and each of them refused to comply therewith.

"And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn into the case, or involved in it or decided either by the Circuit Court of Hamilton County or the Supreme Court of Indiana; that said proposed appeal is for the sole purpose of attempting to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

"And defendant avers the fact to be and so informs the court that said plaintiffs, each and both of them have been and now are in contempt of the authority of this court, and that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

"Wherefore defendant prays the court that said cause be redocketed and that a rule to show cause be entered and a citation issue forthwith to said plaintiffs, Dora E. Rooker and William V. Rooker to appear and show cause if any there be why they and each of them should not be punished as for a contempt of the authority, of this court and its decrees and orders of injunction hereinabove set forth; that this courts former judgment and decree may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurte-

nances and by putting defendant into possession thereof; and that a writ of assistance be awarded to defendant to put it in possession of said lands and appurtenances and to oust said plaintiffs their agents, servants and all acting for and claiming under them.

"And defendant prays for all proper relief in the premises which a court of equity may accord.

"Charles E. Cox
"Henry Seyfried
"Attorneys for Defendant,
Fidelity Trust Company,
Trustee.

"STATE OF INDIANA)
ss
MARION COUNTY)

"I, William M. Fogarty, being duly sworn, on oath do say, that I am the President of The Fidelity Trust Company of Indianapolis, Indiana; that said trust company as trustee is the defendant in the above entitled cause of action and that the matters and facts averred in the above and foregoing petition are true in substance and in fact as I am informed and believe.

"William M. Fogarty.

"Subscribed and sworn to before me, this 15th day of November, 1921.

"James E. Rocap,
"Notary Public.

"My commission expires Oct. 6, 1925."

"And the Court does now order that said defendants be notified forthwith to be and appear in Court at the court house in the city of Noblesville, Indiana, on Monday, November 21, 1921, and then and there show cause why they should not be punished for contempt, if any there be, and then and there answer said information and verified petition."

(Note: The foregoing petition for attachment for contempt was later amended and the clerk certifies that for that reason it is not set out in the clerk's transcript, but it was filed originally in duplicate and therefrom the above copy is produced.

Its original form here is material for many reasons including these viz: (1) It shows what Dora E. Rooker and William V. Rooker were called to answer and (2) it shows the relevancy of issues met with the answers of Dora E. Rooker and William V. Rooker.)

PLEA IN ABATEMENT AND TO THE JURISDICTION

On November 21, 1921, the plaintiffs entered their special appearance and filed their plea in abatement to the defendant's petition for a citation and a writ of assistance, which plea in abatement, omitting the caption was as follows:

"Dora E. Rooker and William V. Rooker, hereby enter their special appearance to the "Petition for Writ of Assistance, etc." filed herein by the Fidelity Trust Company, Trustee, on the 16th day of November, 1921, for the sole purpose of pleading to the jurisdiction of this Court over the subject matter of said petition and over the persons of these respondents to said petition and for cause these respondents say:

"1. That these respondents claim the right and privilege to take this cause direct from the Supreme Court of Indiana to the Supreme Court of the United States for review upon writ of error and upon writ of certiorari, or either of said writs, because of certain questions arising upon the decision and judgment of the supreme court of Indiana involving the rights of these respondents under the constitution and laws of the United States, towit:

"A. That the Indiana Practice Act of March 15, 1913, as amended and approved March 5, 1915, entitled "An Act Concerning Proceedings in Civil and Criminal Cases" impairs the obligation of contracts, and of the contract involved in this suit in contravention of Article One of the Constitution of the United States.

"B. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

"C. That the decision and judgment of the Supreme

Court of Indiana in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

"D. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

"E. That the decision and judgment of the Supreme Court of Indiana takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

"2. That these respondents claim their right and privilege to take said cause directly to the Supreme Court of the United States without the intervention of this Court, pursuant of the judicial code as amended.

"3. That heretofore on the 10th day of November, 1921, these respondents filed in the office of the Clerk of the Supreme Court of Indiana their praecipe in writing for a transcript of the record, proceedings and judgment of said Supreme Court, presenting as it does present, the said Federal question involved therein, as hereinbefore stated; that prior to the filing of said praecipe these respondents paid to the said Clerk as estimate of the cost of said record; that said Clerk of the Supreme Court of Indiana informs these respondents, and upon such information they state the fact to be that said transcript will be completed and ready for delivery to them within the next ten days.

"4. That these respondents have written a brief for the purpose of presenting their petition to said Supreme Court of the United States, and to the Justices thereof, for a writ of certiorari and a writ of error, or either of said writs; that at the present time more than two hundred pages of said brief are printed and said brief is ready for completion when respondents obtain the transcript of said record from the Clerk of the Supreme Court of Indiana, so that, from said transcript, these respondents may insert in said brief the proper page reference to contents of said transcript.

"5. That these respondents are pursuing with due dili-

gence their effort to take said cause for review, as aforesaid to the Supreme Court of the United States; that it is their purpose to perfect and accomplish their said endeavors and present said cause, as aforesaid, to the Supreme Court of the United States within the time required therefor by the laws of the United States.

"6. That prior to the filing of this petition in this cause, these respondents orally informed said Fidelity Trust Company and its attorneys that this cause was to be presented for review as aforesaid to the Supreme Court of the United States; that thereafter and prior to the filing of this petition for a Writ of Assistance, as these respondents are informed and believe, and upon information and belief they state the fact to be, that Charles E. Cox, one of the attorneys for the Fidelity Trust Company in this cause, went to the office of the Clerk of the Supreme Court of Indiana and made an examination of the record and made notation of the entries in this cause and of the said praecipe of these respondents for this record.

"WHEREFORE, these respondents say that this Court is without jurisdiction in the premises and they demand judgment that this proceeding abate, and they pray for all proper relief.

"Christian and Waltz,
W. V. Rooker,
Attys. for Plaintiffs."

There was a verification of the plea in due form.

DEMURRER TO THE PLEA IN ABATEMENT

On November 25, 1921, the same being the 47th Judicial Day, of the October Term, 1921, defendant filed a demurrer to plaintiffs' plea in abatement which demurrer, omitting the caption, was as follows:

"The defendant in the above entitled cause demurs to plaintiffs' plea in abatement to defendant's petition for writ of assistance, etc., therein and for cause of demurrer says that said plea in abatement does not state sufficient facts to abate such petition.

"Charles. E. Cox,
Henry Seyfried,
Attorneys for Defendant."

"MEMORANDUM

"1. In so far as the petition is an information of a contempt by the violation of the injunction decree, the plea in abatement addresses no averments to it, and hence, it can not be abated on this plea. The plea being addressed to the pleading as an entirety it is of course, therefore subject to demurrer for want of facts.

"2. But if the plea did contain averments directed to the petition as an information, and if it was conceded that a plea in abatement would lie to such an information, nevertheless the plea is bad for the rule is that an appeal, even with a supersedeas, does not annul an order of injunction, and a party who disobeys the order by an act done after the appeal may be punished for contempt.

"3. In no case does an appeal without a bond stay execution of any sort on the judgment or decree appealed from. No bond was ever given in the appeal from the judgment and decree in this case nor does it appear from the averments of the plea in abatement that it is purposed to give one in the proposed appeal to the Supreme Court of the United States.

"4. The only effect of an appeal to a court of error is to stay execution on the judgment from which it was taken. In all other respects, the judgment, until it is annulled or reversed stands binding on the parties, as to every question decided. The judgment may be sued on though appealed, and of course can be carried into effect.

"5. There is nothing more averred here in the plea than an intention and certain preliminary steps towards appealing from the Supreme Court of Indiana to the Supreme Court of the United States. Such averments can not serve to abate the petition of defendant.

"6. It is not averred in the plea that the plaintiffs intend to apply for a supersedeas. It is not and cannot be shown that they can procure a supersedeas. Hence the plea is not sufficient to abate the petition.

"7. As a plea in abatement it lacks that high degree of certainty and particularity of averments of facts required

by the law for such pleas which are not favored and against which all intendments are taken.

"Chas. E. Cox,
Henry Seyfried,
Attorneys for defendant."

Thereupon the court ordered: "Said demurrer is now sustained by the court to which ruling the plaintiffs except. And plaintiffs are now ruled to answer or demur to the petition for writ of assistance not later Nov. 28th, 1921."

MOTION TO SEPARATE

On November, 28th, 1921, the plaintiffs filed separate and several motions to separate the causes of action, contained in the application for citation and writ of assistance which separate motions omitting the caption was as follows:

"Dora E. Rooker, and William V. Rooker move the court to require the defendant to separate its petition into paragraphs and number them in such manner as to state separately:

"1. The facts and the relief sought in respect of the application for a writ of assistance.

"2. To state separately the facts and the relief sought in respect of the proceedings in contempt.

"F. G. Christian,
W. V. Rooker,
Attorneys for plaintiffs."

Thereupon the court ordered: "Each of said motions is now sustained by the court to which each of said motions the defendant excepts. And the defendant asks leave of court to amend its petition by striking out that part of the petition asking for a citation for contempt."

THE AMENDED PETITION FOR WRIT OF ASSISTANCE

Leave was granted and thereupon the Fidelity Trust Company as trustee of the estate of Dora E. Rooker erased from its petition for a citation certain words and phrases so as to have the petition, omitting the caption, as follows:

"The Fidelity Trust Company, Trustee, defendant and

cross-complainant in the above entitled cause, respectfully shows to the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiffs' complaint and upon defendant's counterclaim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counterclaim and cross-complaint; that this court, on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee then held the legal title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

"All of the west half of the north half of section eighteen (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres, more or less.

"Also the southwest quarter of section seven (7), township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

"Also, the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

"Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods more or less to White River, thence southerly along said stream with meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place

of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

"And the southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less, situated in Marion County, Indiana.

"It was, in said judgment and decree, further adjudged and decreed that this defendant was then and there entitled on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

"It was further in said judgment and decree adjudged and decreed that said plaintiffs had then parted with all their title to said real estate, and the appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof, and that they then had no interest therein other than interest in the proceeds of the sale of said real estate contingent wholly upon a sale thereof at such a price that, after the payments of costs, liens, said judgment on judgment on account for $50,697 and the further reimbursment of said defendant trustee of such sum or sums as might accrue to it in the execution of said trust an unappropriated sum might still remain in defendant's hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds, aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and obstructive of the completion of the execution of said trust by said defendant and that said plaintiffs were then and there and thereby, each and both perpetually enjoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give possession and, from in any manner interfering with, disputing or

obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands.

"It is further, in said judgment and decree, ordered adjudged and decreed that said defendant, trustee should proceed, under the terms of the deeds and trust agreement under which it held title, to sell said lands and to proceed and first make sale of said Marion County lands and later to make sale of said Hamilton County lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or diasppproval.

"Said judgment and decree further directed the application of the proceeds of such sales.

"And defendant further avers, that at the conclusion of the hearing and trial of said cause and before the finding and judgment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered by the agreement of the parties to said action, plaintiffs and defendant, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton County lands and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn, and to collect the proceeds and apply and distribute the same under the direction of the court; that said trust company did appear in open court on said day and did accept said trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from said trust.

"And defendant further avers that said plaintiffs filed in the Supreme Court of Indiana a vacation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issued to stay execution on said judgment and that the same has been and remained in full force and effect and is now; that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and thereafter plaintiffs filed a petition for a rehearing, thereof which was on October 12, 1921, in all things overruled and said judgment became absolutely final.

"And plaintiff further avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure a purchaser and to sell said Marion County real estate; that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, of Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court that such exceptions and objections were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay or proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained and is now in full force and effect; that defendant did, pursuant to said order execute its deed by delivering to said Triangle Realty Company and received the consideration of said sale, towit, the sum of $16,000.

"And defendant further avers that notwithstanding the aforesaid judgment and decree of December 21, 1918, said plaintiffs, Dora E. Rooker and William V. Rooker, have at all times since claimed to be the owners of said real estate and entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendant; that without right and without the knowledge of this defendant and without the knowledge or approval of the court, said plaintiff procured said Wainwright Trust Company, receiver as aforesaid to make leases to one West for the crop, years 1919 and 1920, of the tillable parts of said Hamilton County lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amount and value of which are at this time unknown to defendant, and did deliver one-half thereof to said Dora E. Rooker and said William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that

said plaintiffs unlawfully and in violation of the decree of this court converted said crops to their own use; that in the year 1920 said plaintiffs without the knowledge of defendant or this court took the rental of said Hamilton County lands out of the hands of this court's receiver, said Wainwright Trust Company and themselves rented the same to one Thomas West for a grain rent for the crop year 1921 providing therein that he should deliver the landlord's share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921, produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlord's share thereof fifty tons of the value of $600.00 which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3,000 bushels of corn of the net value of $1,000 of which plaintiffs are claiming one-half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threatening said West with legal action if he does not comply with such demand and are seeking by threats and intimidation to prevent him from gathering his share of said corn if he does not so comply.

"And defendant further avers that at the time of the sale of said Marion County land in 1919 as aforesaid there was then on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlord's share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it all of which said tenant was then and there informed by defendant; that said plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser

as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's share of said crops, and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant, and to hold possession thereof as such and to deliver to them the landlord's share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of 1921, continue to do; that in the years 1919, 1920 and 1921, said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of 1921, said purchaser received possession of said lands and put its own tenant in possession thereof whereupon, on the day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant, was a trespasser on said premises and that he, Rooker, was the owner thereof with the right to the possession and use thereof.

"And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held possession of the dwellings and other appurtenances of said Hamilton County lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against said lands, including taxes, insurance, etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiffs

conduct and the depreciation of said property it can not now be sold at a price which will pay the costs and expenses and reimburse it fully for its outlay and interest.

"And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton County lands and appurtenances which demand was refused by them and they and each of them refused to comply therewith.

"And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn into the case, or involved in it or decided either by the Circuit Court of Hamilton County or the Supreme Court of Indiana; that said proposed appeal is for the sole purpose of attempting to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

"And defendant avers that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

"Wherefore defendant prays the court that said cause be redocketed and that this court's former judgment and decree may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurtenances and by putting defendant into possession thereof; and that a writ of assistance be awarded to defendant to put it in possession of said lands and appurtenances and to oust said plaintiffs, their agents, servants and all acting for and claiming under them. And defendant prays for all proper relief in the premises which a court of equity may accord.

"Charles E. Cox
Henry Seyfried
Attorneys for Defendant"
Fidelity Trust Company, trustee

STATE OF INDIANA }
MARION COUNTY }

"I, William M. Fogarty, being duly sworn, on oath do say that I am the President of The Fidelity Trust Company of Indianapolis, Indiana; that said trust company as trustee is the defendant in the above entitled cause of action and that the matters and facts averred in the above and foregoing petition are true in substance and in fact as I am informed and believe.

"William M. Fogarty

"Subscribed and sworn to before me, this 15th day of November, 1921.

James E. Rocap, Notary Public.

"My commission expires Oct. 6, 1925."

DEMURRER TO THE WRIT OF ASSISTANCE AS AMENDED

The plaintiffs thereupon separately and severally demurred to the application for writ of assistance, which demurrer, omitting the caption, was as follows:

"Dora E. Rooker and William V. Rooker demur to the petition of the defendant, Trustee, as amended and for their demurrer plaintiffs say:

"1. That there is a defect of parties plaintiff in said petition in this, towit: That upon the proceedings and judgment recited in said petition and the record of this court pertaining thereto, it is apparent that said judgment is the joint judgment of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company, in its corporate capacity proper, is not a co-petitioner in said petition nor is it made a defendant to answer thereto nor in any wise required to assert its interest in the premises, nor is there any showing in said petition that said interest of the Fidelity Trust Company in its corporate capacity proper has been transferred to and is held by the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company in its corporate capacity proper should be joined as a co-petitioner in said petition or it should be named

as a defendant thereto and the reasons shown why said Fidelity Trust Company in its corporate capacity proper fails to join in said petition.

"2. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, towit; That it is named in said petition that the Wainwright Trust Company is receiver of the lands in controversy situate in Hamilton County in the State of Indiana; that said receiver is a necessary and proper party to these proceedings and said petition should require the Wainwright Trust Company to appear and answer as to its interest in the premises.

"3. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, towit: That it is named in said petition that Thomas West is tenant of the lands in controversy situate in Hamilton County in the State of Indiana; that said tenant is a necessary and proper party to these proceedings and said petition should require the said Thomas West to appear and answer as to his interests in the premises.

"4. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, towit: That it is named in said petition that James L. Wheatley is tenant of the lands in controversy situate in Marion County in the State of Indiana; that said tenant is a necessary and proper party to these proceedings and said petition should require the said James L. Wheatley to appear and answer as to his interests in the premises.

"5. That said petition does not state facts sufficient to constitute a cause of action as a petition for a writ of assistance.

"6. That said petition as amended is not verified.

"MEMORANDUM

"For their memorandum with their demurrer in respect of the insufficiency of said petition to state a cause of action, these plaintiffs say:

"1. That the judgment sued on is a joint judgment and can not be enforced singly.

"2. That the Fidelity Trust Company, Trustee, is not the real party in interest.

"3. That it is not shown that the Fidelity Trust Company in its corporate capacity proper withholds its consent from this proceedings.

"4. That the writ of assistance is not a primary writ but is issued only in aid of a prior process of court and that no such process has been issued out of this court on this judgment.

"5. That no execution ever has been issued on the judgment and decree of court mentioned in said petition.

"Respectfully submitted,

"F. G. Christian,
W. V. Rooker,
"Attorneys for Plaintiff."

Said demurrers were overruled by the court to which of each separate rulings the plaintiffs separately excepted. The plaintiffs thereupon filed an answer to the petition, for writ of assistance, which answer, omitting the caption, was as follows:

ANSWERS TO THE PETITION FOR WRIT OF ASSISTANCE

"Dora E. Rooker and William V. Rooker, plaintiffs in the cause above entitled, for their answer to the petition for a writ of assistance say, that they deny each and every allegation therein contained.

"F. G. Christian
W. V. Rooker
Attorney for Plaintiffs"

On December, 8th, 1921, the plaintiffs filed a second paragraph of answer to the petition for writ of assistance, which second paragraph of answer, omitting the caption, was as follows:

"2. Dora E. Rooker and William V. Rooker, plaintiffs in the cause above entitled, but who are made defendants to the information and petition, filed under in said cause by the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, for their further defense to said information and petition say: That this Honorable Court, should not proceed further in this cause for that on towit, the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the clerk of the Supreme Court of the United

States and caused to be docketed as an action pending in said court their petition for a writ of certiorari to be issued out of said court to the Supreme Court of Indiana, to bring to said Supreme Court of the United States a transcript of the record proceedings and judgment of the Supreme Court of Indiana in Cause No. 23,598 in said court wherein the said Dora E. Rooker and William V. Rooker are appellants and the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker are appellees; that said cause No. 23,598 in the Supreme Court of Indiana is the same cause on appeal as No. 16,338 in this court and the judgment sought to be revised and corrected on said writ of certiorari is the same judgment and none other, upon which in this proceeding the said Fidelity Trust Company relies; that there are presented in said petition for a writ of certiorari certain Federal questions in the form and manner following, towit:

"THE FIRST FEDERAL QUESTION

"1. The Indiana Civil Practice Act of March 15, 1913 as amended and approved March 5, 1915, is a state law impairing the obligation of contracts, and is in contravention of Article 1, Section 10, of the Constitution of the United States. The evil of this act reposes in the fact that it admits the substitution of "conclusions" in the place of facts in pleadings, evidence, verdicts and judgments of courts. The effect of the statute is that contracts can be declared upon as meaning what they do not mean and thereby that causes can be tried upon false issues to the injury of litigants.

"The second amended counter claim and as supplemented pleaded conclusions in contravention of the facts and proceeded upon the theory:

"FIRST: That by their deeds and trust agreement these petitioners parted with all their interest in the trust estate, together with the right of possession and the ownership of the rents and profits. Accepting as true the pleaders' conclusions in the second amended counter claim, and as supplemented, the trial court adopted the theory that these petitioners by their deeds and trust agreement, having parted with all their interest in the trust estate, together with the right of

possession and the ownership of the rents and profits, were not competent to present any issue affecting the misfeasance or malfeasance of the trustee, to which the trustee was bound to respond, and to effectuate this theory the trial court held and decided adversely to these petitioners every question they raised, including:

"a. It denied the various motions to strike out the second amended counter claim.

"b. It denied the various motions to make more specific the second amended counter claim.

"c. It overruled the various demurrers to the second amended counter claim and as supplemented.

"d. It overruled every objection made by these petitioners at the trial of the cause, to the introduction of various matters n evidence.

"e. It made a special finding of facts in which it denied that these petitioners had any interest in the trust estate or in its administration.

"f. It denied the motion of these petitioners for judgment on the special findings.

"g. It stated conclusions of law adverse to the claims of these petitioners that as *cestuis que trust* they had a competent interest in the trust estate which entitled them to complain of its repudiation by the trustee, of the trustee's renunciation of the duties; of the acts of misfeasance and malfeasance of the trustee in the administration of its office.

"h. It rendered judgment upon the complaint and upon the counter claim adverse to the claim of these petitioners that as *cestius que trust* they had no competent interest in the trust estate which entitled them to complain of its repudiation by the trustee, of the trustee's renunciation of its duties, of the acts of misfeasance and malfeasance of the trustee in the administration of its office.

"i. It entered its injunction against these petitioners prohibiting them forever from asserting any claim, interest or right in respect of the trust estate and its administration, and held that their sole interest and right was to receive from the

trustee any residue which the trustee should turn over to them at the end.

"j. It denied that the act of repudiation of October 28, 1912, had any potency to impeach the trustee upon the complaint of these petitioners.

"k. It denied that the original cross complaint of the Fidelity Trust Company, declaring upon the trust deed as a mortgage had any potency to impeach the trustee upon the complaint of these petitioners.

"l. It denied that the sheriff's sales of all the real estate of the trust estate, made upon the order and direction of the Fidelity Trust Company, in execution of its judgment rendered upon the foreclosure of the trust deed as a mortgage has any potency to impeach the trustee on the complaint of these petitioners.

"m. It denied every question raised in this case and many which were not raised in it, in such manner as to exclude and foreclose any and every claim, interest and right of these petitioners in and to the trust estate during the term of its administration.

"SECOND: Accepting as true the pleader's conclusions in the second amended counter claim and as supplemented, that the claim therein described was a debt in fact and in law, the trial court held that said debt was matured so that it could go to judgment, and this notwithstanding the total absence of a time limitation upon which the debt might mature, and in the absence of a time limitation of any stated contract to pay; notwithstanding the absence, also, of any misconduct or default on the part of these petitioners by which the maturity of said debt was advanced or fixed, and in the absence of both a time limitation and of any misconduct or default on the part of these petitioners; notwithstanding the absence, also, of any issue tendered by the trustee that it had been delinquent but that it had done acts and deeds beneficial to the trust estate and accepted by it which exceeded in value the wrongs done by the trustee to the trust estate in its maladministration. And having adopted this theory of the maturity of debt the court made rulings which included the following:

"a. It denied the various motions to strike out the second amended counter claim.

"b. It denied the various motions to make more specific the second amended counter claim.

"c. It overruled the various demurrers to the second amended counter claim and as supplemented.

"d. It overruled every objection made by these petitioners at the trial of the cause to the introduction of various matters in evidence.

"e. It made a special finding of facts in which it found that the debt was matured and these findings were adverse to the pleadings and the evidence.

"f. It denied the motion of these petitioners for judgment on the special findings.

"g. It stated conclusions of law adverse to the showing made upon the pleadings and proof that said claim was not a debt matured.

"h. It overruled petitioners' exceptions to the conclusions of law.

"i. It rendered judgment adverse to the facts as shown upon the pleadings and proof, and adjudged said claim to be a debt matured and competent to enter into judgment.

"j. It overruled the motions of these petitioners for new trial.

"k. It fixed the penalty of the appeal bond at the excessive sum of $65,000.00 in order to prevent an appellate review of said judgment.

"THIRD: Accepting as true the pleader's conclusions in the second amended counter claim as supplemented, that the counter claimants therein had well and duly performed all the conditions on their part to be performed, and this notwithstanding said pleadings showed upon their face that said averment was sham and false, the court made rulings which included the following:

"a. It denied the various motions to make more specific the second amended counter claim.

"b. It denied the various motions to make more specific the second amended counter claim.

"c. It overruled every objection made by these petitioners at the trial of the case to the introduction of various matters in evidence.

"e. It denied all probative effect of the act of repudiation of October 28, 1912.

"f. It denied all probative effect of the pleadings upon which issue was joined at the first trial of this cause.

"g. It denied all probative effect of the first judgment in this cause.

"h. It denied all probative effect of the sheriff's deed of June 8, 1915, whereby the Marion County lands of the trust estate was conveyed upon its own execution sale to the Fidelity Trust Company.

"i. It denied all probative effect of the sheriff's deed of September 28, 1915, whereby the Hamilton County lands of the trust estate were conveyed upon its own execution sale to the Fidelity Trust Company.

"j. It made a special finding of facts, in which it denied the probative effect of uncontroverted evidence of the trustee's misfeasance and malfeasance in office from October 28, 1912, to the date of said finding.

"k. It made a special finding of facts, in which it denied the probative effect of the opinion and judgment of the Supreme Court on the first appeal of this case.

"l. It denied the motions of these petitioners for judgment on the special findings.

"m. It stated conclusions of law adverse to the pleadings, the proof and the special findings.

"o. It fixed the penalty of the appeal bond at the excessive sum of $65,000.00 in order to prevent an appellate review of the record, proceedings and judgment of the trial court.

"THE SECOND FEDERAL QUESTION

"2. The judgment of the Hamilton Circuit Court of Indiana deprives these petitioners of their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. This quality of the Court's judgment traces to the Practice Act of March 15, 1913, as

amended and approved March 5, 1915, which not only impairs the obligation of the contract, but has the further vice that it strikes down the precedents in procedure and allows the court to act arbitrarily and without the essentials of jurisdiction, and to hear and determine cases upon false issues.

"FIRST: The judgment of the Hamilton Circuit Court wrongfully and unlawfully denied to these petitioners, and each of them, the remedies for the enforcement and protection of their rights, which existed at law at the time said contract was made and which entered into and became a part of the consideration of said contract and were its obligations, towit:

"a. That fictions in pleadings were abolished in Indiana and that suits and actions could be instituted, maintained and defended only by the real parties in interest.

"b. That in all suits and actions recovery must be had *secudum allegata et probata* or not at all.

"c. That the terms of a written instrument could not be varied with parol evidence.

"d. That where a written instrument entered into and became a part of any pleading, proof, finding, verdict or judgment of the court, the terms of said instrument prevailed over any conclusion to the contrary in said pleading, proof, finding, verdict or judgment.

"e. That the *cestui que trust* was the equitable owner of the trust estate and because of such interest could maintain suits and actions for the protection and benefit of the trust, as against a delinquent trustee.

"f. That repudiation of a trust contract by the trustee was an actionable wrong for which *cestui que trust* could bring and maintain his suit or suits against the delinquent trustee.

"g. That where repudiation occurred by the trustee the *cestui que trust* could sue to defend and conserve the trust property.

"h. That where repudiation of a trust by the trustee occurred and action was thereupon begun against the trustee by the adversary parties in interest, there could be no reinstatement of the trust other than a conventional reinstatement, and this required the making of a new contract by and

between the parties in interest, the reinstatement in every such instance being contractual.

"i. That it was within the province of the courts to enforce contracts, but not to make them.

"k. That where an act of repudiation was accomplished by a trustee, thereupon the trustee waived, surrendered and abandoned his rights under the contract, except that he became, as against the trust estate, a creditor as on a general account for any benefits received by the trust estate in excess of damages sustained because of the trustee's delinquency.

"l. That where one who has been a trustee became by his own misconduct a mere general creditor of the trust estate, then he had no such interest thereafter in the trust estate as would protect him in making any further payments or advancements of money to the credit of the trust, but all such subsequent payments and advancements were and would be held to be voluntary and not actionable.

"m. That a complaint, and the proof to sustain it, and the verdict or findings of the court thereon, should be good as to all who joined therein or it would be bad as to all.

"n. That it was an act of repudiation of the trust for a trustee to join with a creditor in a suit against the trust estate.

"o. That a trust estate was entitled to have its day in court and that no judgment could be rendered against it unless it was represented in the case by some person qualified, competent and having an interest.

"p. That the denial to the trust estate of the remedies in its behalf which existed at the time the trust contract was made and which entered into the consideration thereof and became its obligation, are stated in the particular rulings specified under "The First Federal Question" *supra*, to which reference is hereby made for greater certainty.

"THE THIRD FEDERAL QUESTION

"3. The judgment of the Supreme Court of Indiana deprives these petitioners of their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. This quality of the court's judgment traces not only to vices of the Practice Act of March

15, 1913, as amended March 5, 1915, as stated in Points 1 and 2 *supra*, but the judgment of the Supreme Court has the additional vice that it was made *corum non judice* by the disqualification of the court, one of the members of which, Judge Louis B. Ewbank, who had a large and vital interest and duty, both personal and fiduciary, in the precedents to be established by this case, and these interests and duties of Judge Ewbank were hostile to and in derogation of the rights of these petitioners in this case. These disqualifying interests and duties of said Ewbank, and the method of their disclosure to petitioners, are recited in the assignment of errors as it relates to the ruling on the petition for a rehearing.

"THE FOURTH FEDERAL QUESTION

"4. The judgment of the Hamilton Circuit Court of Indiana denies to these petitioners the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States *quoad hoc;* the court holds that these petitioners because of their trust deed, creating the trust and lodging the legal title of the property in the trustee for the purposes of the trust, thereby parted with all their interest in the affected property, and therefore have no standing in court to protect their trust estate as against the misfeasance and malfeasance of the malevolent trustee, who had repudiated the trust and announced its obligations thereunder. The petitioners contend that the *cestuis que trust* are the equitable owners of the affected property; that this interest of the *cestuis que trust* continues until the final determination of the trust and that where the trust agreement calls for performance *in pais* to determine the trust that judicial determination thereof cannot be substituted for that which the parties agreed upon as the consideration for and obligation of their contract.

"The fourth federal question arises upon the record in the same manner as the first and second federal questions arise, and as to the statement of the *supra* reference is hereby made for greater certainty.

"THE FIFTH FEDERAL QUESTION

"5. The judgment of the Supreme Court of Indiana denies to these petitioners the equal protection of the laws in con-

travention of the Fourteenth Amendment of the Constitution of the United States. The merit of this point and its determination involves collectively those issues and matters which are severally stated in Points 1, 2, 3 and 4 *supra*.

"THE SIXTH FEDERAL QUESTION

"6. The judgment of the Supreme Court of Indiana denies to these petitioners due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States, in holding that these petitioners should be denied the remedies and processes of the law because to apply them in behalf of petitioners would work to the great harm and loss of appellee trust company, and to the unearned and undeserved large money benefits to appellants.

"FIRST: The sixth federal question arises upon the face of the opinion of the Supreme Court as it assumes to state and to interpret the record, and includes the following points, namely:

"a. The Supreme Court erred in holding that the rescission of the act of repudiation of the trust, made by the trustee, was not a contractual right of the parties, but was a mere matter of judicial remedy. The application of this doctrine of rescission controls the right to make contracts and by substituting for that right the judicial power to create a contractual status for these petitioners, the court denies to these petitioners the equal protection of the laws. It imposes upon them a conventional status without their consent. Rescission is a contractual right and not a judicial remedy in the first instance.

"b. The Supreme Court erred in holding that the election of remedies was a doctrine which applied only where there were in fact two remedies available, and that these petitioners waived their exceptions to the conclusions of law by moving for judgment on the special findings, although there was in fact no such remedy known to the law as a motion for judgment on the special findings. The Supreme Court refused to consider the motion for judgment on the special findings because there was no such remedy known to the practice, and thereupon refused to consider the exceptions to the conclusions of law

because the petitioners had sought the countervailing remedy of a motion for judgment. This ruling withholds from the petitioners remedial rights upon the same terms which it grants them to respondents and all in respect of matters vital in the case. This is the denial of the equal protection of the laws.

"c. The Supreme Court erred in holding that the only remedy the respondents had was to sue upon the contract as "fully and duly performed." This is an erroneous statement of the law, and as a recital of the record it is false in fact. It is one of those erroneous "conclusions" which the Practice Act of March 15, 1913, as amended and approved March 5, 1915, assumes to qualify the courts to put forth in the place and stead of the facts and of the truth. In the prayer of the amended complaint, these petitioners ask that any sum they may be found to owe the respondents be ascertained and that an exact time be fixed for its payment, and that a receiver be appointed to proceed with the execution of the trust. Again, in their motions to strike out the second amended counter claim, in their motions to make that pleading more specific and in their demurrers thereto, the petitioners distinctly pointed out that three forms of action were available; namely, (1) action on the contract as having been completely performed, (2) action on the contract as having been broken by these petitioners and recovery by the respondents on the *quantum meruit*, employing the contract to fix the measure of damages, (3) action on the contract as having been breached by the respondents, but with the averment that while acting under the contract, respondents had done acts and expended money in excess of the damages suffered by the trust estate because of respondents' breach of the trust contract. The rule that recovery must be had *secundum allegata et probata* was material in choosing the truthful one of these three remedies. The trial record in rulings on evidence, the special findings, the conclusions of law and the judgment all impeach, rather than sustain, the theory and averments of the second amended counter claim, to the effect that the counter claimants had duly and lawfully performed all the conditions to be by them performed. Denying to petitioners the benefit of these rules of remedial procedure was a denial to petitioners of the equal

protection of the law, and the denial was unspeakable when the Supreme Court, as it did do, based the denial on the ground that the application of the rule "here would work to the great harm and loss of the appellee trust company."

"And the said Dora E. Rooker and William V. Rooker now here aver that each and all said federal questions are involved in the present record of this court in this cause at this time.

"That along with their said petition for a writ of certiorari so filed in the office of the Clerk of the Supreme Court of the United States the said Dora E. Rooker and William V. Rooker filed thirty copies of their brief on said petition and they caused said petition to be noted for submission to the court Tuesday the 3rd day of January, 1922, when the court convenes or as soon thereafter as counsel can be heard; that thereafter they served on the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, notice of said motion to submit and deliver to them a copy of said petition for writ of certiorari and brief thereon and they thereafter transmitted said notice of motion and proof of service thereof to the Supreme Court of the United States and caused the same to be noted on the docket of said court where said cause is now pending; that upon the facts in the premises the jurisdiction of this cause is now wholly and exclusively in the Supreme Court of the United States and this court should proceed no further.

"Wherefore these plaintiffs and cross defendants demand judgment.

"Christian & Waltz,
W. V. Rooker,
Attorneys for Plaintiffs."

"MOTION TO STRIKE OUT ANSWER TO PETITION FOR WRIT OF ASSISTANCE

"On December 9, 1921, the defendant filed its motion to strike out plaintiffs' second paragraph of answer to the petition for a writ of assistance, which motion, omitting the caption, was as follows:

"The defendant in said cause moves the Court to reject and strike from the files of the cause the second paragraph

of plaintiffs' answer to defendant's writ of assistance herein, for the reason that said paragraph of answer avers facts in the nature of abatement and not in bar of said petition.

"Charles E. Cox,
Henry Seyfried,
Attorneys for Defendant."

"FURTHER PLEA TO THE JURISDICTION

"On January 10, 1922, plaintiffs asked leave to withdraw their answer to defendant's petition for writ of assistance and to file an additional plea to the jurisdiction. Leave was granted by the court and said answer as heretofore filed was withdrawn and plaintiffs filed an additional plea to the jurisdiction, which, omitting the caption, was as follows:

"2. Dora E. Rooker and William V. Rooker, defendants to the cross petition herein of the Fidelity Trust Company as trustee of the Estate of Dora E. Rooker for their second and further plea to the jurisdiction of this court in the matter of the cross petition of the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, say:

"That the court should proceed no further in this matter for the reason that the jurisdiction of the subject matter of this cause and of the parties thereto is exclusively in the Supreme Court of the United States upon the facts following, towit:

"1. On the 12th day of October, 1921, this cause was pending in the Supreme Court of Indiana on appeal from the judgment of this court in the controversy herein and on said day said Supreme Court overruled said petition for rehearing.

"2. On the 14th day of December, 1921, these defendants to said cross petition and plaintiffs in said principal case, and appellants in said cause in the Supreme Court of Indiana, filed in the office of the Clerk of the Supreme Court of Indiana their petition for a writ of error to the Supreme Court of the United States in said cause and they filed at the same time and in the same place their assignment of errors; that thereupon said petition for a writ of error was presented to the Chief Justice of the Supreme Court of Indiana who allowed the same and fixed the appeal bond at the penal sum of one thousand dollars

conditioned as provided by law for the payment of all damages and costs and approved the New Amsterdam Casualty Company of New York as surety on said bond; that thereupon said bond so fixed and conditioned was approved by the Chief Justice of the Supreme Court of Indiana and filed in said cause in the office of the clerk of said Supreme Court.

"3. On the 15th day or December, 1921, the writ of error of the Supreme Court of the United States issued in the name of the President, bearing tests of Noble C. Butler, Clerk of the District Court of the United States and the seal of said court, was filed by these defendants in said cause in the office of the Clerk of the Supreme Court of Indiana.

"4. On the 17th day of December, 1921, these defendants as appellants in said cause in the Supreme Court of Indiana and as plaintiffs in error in said cause in the Supreme Court of the United States, filed in the office of the clerk of the Supreme Court of Indiana, their citation to the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, commanding their presence as required by law in said cause in the Supreme Court of the United States, and together with said citation these defendants filed with said citation in the office of the Clerk of the Supreme Court of Indiana the acknowledgment of service thereof on said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as said trustee.

"5. That on the 19th day of December, 1921, these defendants, as said appellants in the Supreme Court of Indiana and as said plaintiffs in error in said cause in the Supreme Court of the United States, lodged for said defendants in error, a copy of said writ of error in the office of the clerk of the Supreme Court of Indiana.

"6. That on the 22nd day of December, 1921, these defendants as said plaintiffs in error in said cause in the Supreme Court of the United States filed their praecipe in the office of the clerk of the Supreme Court of Indiana for a transcript of the record proceedings and judgment of the Supreme Court of Indiana in said cause, and with said praecipe they filed the acknowledgment of service thereof on said defendants in error.

"7. That these defendants are informed and believe that the clerk of the Supreme Court has at this time practically completed said transcript and he informs them, and upon information they state the fact to be, that said clerk will have said transcript in the office of the clerk of the Supreme Court of the United States, all within the manner and time provided by law.

"Wherefore these defendants pray judgment that this court proceed no further and that they be discharged hence with their costs and they pray for all proper relief.

"Christian & Waltz,
W. V. Rooker,
Attorneys for Defendants.

"William V. Rooker being first duly sworn upon his oath says that he is one of the defendants in the matters above entitled on said cross petition; that the facts in the premises lie particularly within the knowledge of this affiant and not of his co-defendant; that for himself and his co-defendant he makes this affidavit and says that the facts stated in the foregoing answer and plea are true and further affiant saith not.

"William V. Rooker.

"Subscribed in my presence and sworn to before me this day of January, 1922.

"Witness my hand and official seal.

"J. D. Hill,
Clerk of the Hamilton C. C.

"LEASE OF THE LANDS MADE UPON PETITION

"On February 7th, 1922, the Fidelity Trust Company, trustee, filed its petition without notice thereon for leave to enter into a lease contract with one Thomas West, for the lands held by it, by the term of the trust deed herein, for the year 1922, which petition, omitting the caption, was as follows:

"The Fidelity Trust Company, Trustee, respectfully represents and shows to the court that it has, since the affirmance by the Supreme Court of Indiana of the decree of this court wherein and whereby your trustee was directed to sell the lands and

tenements in Hamilton County, Indiana, described therein as provided in said decree and pursuant to the terms of the trust agreement involved in said action and said decree, made effort to so sell said lands and tenements; that it has not been able to do so and will not be able to do so before the beginning of the crop year on March 1, 1922, for the reason that the plaintiffs are now attempting to perfect an appeal of said cause from the Supreme Court of Indiana to the Supreme Court of the United States; that on July 31, 1918, by agreement of the parties the Wainwright Trust Company was appointed temporary receiver to take charge of the said property and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn; that thereafter this court entered its judgment and decree for this trustee, which judgment and decree was thereafter finally affirmed by the Supreme Court of Indiana; that the aforesaid receiver had abdicated and neglected its duties wholly and has never reported to this court; that unless said tillable lands are rented and farmed for the crop year of 1922 it will cause loss and waste to the trust estate; that therefore, your trustee has tentatively leased said tillable lands to one Thomas West for said year on a basis of grain rent and prays the lease thereof to him may be approved by the court, and ordered delivered.

"Fidelity Trust Company, Trustee.

"By J. Albert Smith, Vice-President.

"J. Albert Smith being duly sworn on his oath says that he is Vice-President of the Fidelity Trust Company which is trustee and defendant in the above cause and as such is informed of the facts set forth in the above and foregoing petition and that the same are true.

"J. Albert Smith.

"Subscribed and sworn to before me this 27th day of February, 1922.

"A. E. Sauch, Notary Public.

"My commission expires Oct. 4, 1925."

Thereupon the court ordered: "Said petition is now granted by the court and said trustee now presents to the court its

lease contract with said Thomas West, which lease contract is now approved by the court and reads as follows: (not on file)

MOTION TO VACATE ORDER LEASING LANDS

"On March, 4th, 1922, Dora E. Rooker and William V. Rooker, entered their special appearance for the purpose of moving the court to set aside and vacate the order of approval by the court of the lease entered into by the Fidelity Trust Company with one Thomas West as entered of record on the 27th day of February, 1922. Their motion, omitting the caption, was as follows:

"Dora E. Rooker and William V. Rooker, specially appearing herein for the purposes only of this motion, move the Court to set aside and vacate the order and judgment and proceedings had thereon, made and entered herein on, to-wit: the 27th day of February, 1922, and for cause the said Dora E. Rooker and William V. Rooker say:

"1. That said order and judgment, and the proceedings had thereon, are wholly void for the reason that the same were made, entered and taken wholly without any notice whatever to the said Dora E. Rooker and William V. Rooker, or either of them, and wholly without their information and without the information of either of them.

"2. That the jurisdiction of the parties to the subject matter of the proceedings herein complained of is and for many weeks continuously last past has been exclusively in the Supreme Court of the United States as must be and is apparent upon the facts in the premises, to-wit: The real estate in question and the custody thereof, and the right to the use and possession thereof, and the right to the rents and profits thereof, are a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker, as plaintiffs, and the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company, as trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at one time, but not since the year 1919, pending in this Court as Cause No. 16,338; that on, to-wit: the 31st day of December, 1918, a judgment adverse to said Dora E. Rooker and William V. Rooker was rendered in this

court in said cause; that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of this Court; that on, to-wit: the 22nd day of June, 1921, the Supreme Court of Indiana affirmed said judgment of this Court and thereafter on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on, to-wit: the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States and to the Justices thereof for a Writ of Error to the Supreme Court of Indiana in said cause; that afterwards on, to-wit: the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker lodged in the office of the Clerk of the Supreme Court of the United States their transcript of said record, proceedings and judgment and at the same time the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a Writ of Certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana and said petition was duly docketed as a cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money, all as required by the rules and practice of the Supreme Court of the United States; that afterwards on, to-wit: the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States in said cause was issued on the petition therefor of the said Dora E. Rooker and William V. Rooker and at the same time Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for the payment of all damages and costs, which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, Dora E. Rooker and William V. Rooker filed their citation, and the proof of service thereof, in the office of the Clerk of the Supreme Court of Indiana;

that on December 19th, 1921, Dora E. Rooker and William V. Rooker lodged in said Clerk's office a copy of said Writ of Error in said cause for said Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as trustee of the estate of Dora E. Rooker; that on December 22nd, 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court in said cause on said Writ of Error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court where the same was duly docketed and is now pending as Cause No. 785, October Term, 1921, in the Supreme Court of the United States and for the better identification of said cause and for greater certainty, the said Dora E. Rooker and William V. Rooker now make reference to the said proceedings and judgment of this Court in said Cause No. 16,338.

"3. That said order and judgment of February 27th, 1921, and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatsoever to the said Dora E. Rooker and William V. Rooker, or either of them and without their having any knowledge whatsoever that said petition upon which said order and judgment were founded was filed and pending and being heard and determined in this court; that the first time said Dora E. Rooker and William V. Rooker or either of them learned of said order, proceedings and judgment of February 27, 1922, was on the afternoon of March 3, 1922.

"4. That said order and judgment and the proceedings had thereon take the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that the Court in which said order and judgment and the proceedings had thereon were taken, was

wholly without jurisdiction of the parties and the subject matter of said petition for the reasons hereinbefore stated in recital of the steps taken to lodge and vest the jurisdiction over said parties and over said subject matter in the Supreme Court of the United States.

"Wherefore the said Dora E. Rooker and William V. Rooker pray the judgment of this Court that said order and judgment and the proceedings had thereon, of February 27, 1922, be adjudged and held to be null and void and they pray that this Court proceed no further, and they ask for all proper relief.

"Christian & Waltz,
W. V. Rooker,
Attorneys for Dora E. Rooker et al.

"State of Indiana, County of Hamilton: ss

"Dora E. Rooker and William V. Rooker, being first duly sworn on their oaths say that they are the defendants in the matter above entitled and that the foregoing answer is true in substance and in fact. And further they say not.

"Dora E. Rooker,
William V. Rooker.

"Subscribed and sworn to before me this 4th day of March, 1922.

[SEAL] "J. D. Hill, Clerk".

On the 7th of March, 1922, the motion of Dora E. Rooker and William V. Rooker to vacate the order of February 27, 1922, was overruled and the Court noted of record: "Come now the parties and the motion of Dora E. Rooker and William V. Rooker to vacate the order of approval of the lease made between one Thomas West and Fidelity Trust Company is now overruled by the Court to which ruling the said Dora E. Rooker and William V. Rooker except."

West having been put in possession of the affected lands under this pretended lease, unlawfully remains in possession to the exclusion of Dora E. Rooker and William V. Rooker. Among the relief sought herein is that West be ousted from said possession and that the possession of said lands be restored forthwith to Dora E. Rooker and William V. Rooker or either of them.

THE TRIANGLE REALTY COMPANY

The possession of the Marion County lands was colorably delivered by the Fidelity Trust Company to the Triangle Realty Company in September, 1921. This Triangle Realty Company was organized March 19, 1919, by Henry Seyfried as attorney. The capital stock was fixed at eight thousand dollars; the capital stock does not appear to have been fully paid, or, if paid it was not paid in money; the company has no assets other than said capital stock less any sum paid on account thereof; the incorporators and sole stockholders of said Triangle Realty Company are Judson D. Moschelle, Annie K. Moschelle, wife of Judson D. Moschelle, and Cassie L. Kelly, office girl of Judson D. Moschelle; Annie K. Moschelle and Cassie L. Kelly each held one share of stock, acquired by gift.

The sale of the Marion County farm was made to the Triangle Realty Company before the trial judge received, approved and allowed the final bill of exceptions in the second appeal of this case to the Supreme Court of Indiana. The delay in obtaining and approving that bill is apparent upon the printed transcript of the record in No. 785, pages 451-452. The absence of a supersedeas became therefore immaterial. The jurisdiction of the Supreme Court of Indiana was anticipated and forestalled there just as the jurisdiction of this Court was sought to be anticipated and forestalled in this proceeding by the lease to Thomas West of the Hamilton County lands.

THE DAMAGES TO THE MARION COUNTY FARM

When the Triangle Realty Company came into possession of the Marion County farm James L. Wheatley, was ousted. He had, as a tenant farmer, been in the physical possession of the farm several years. His affidavit shows that Charles E. Cox, J. Albert Smith and Amo Buck came to him while he was gathering his corn and with threats and menaces forced him to quit the farm and abandon the possession, the crops and property thereon. He estimates the corn he abandoned at 2,500 bushels, valued at one dollar per bushel, the straw at ten ton, value at $11.00 per ton; the rental of the house and

barn at $15.00 per month; 150 shocks of fodder at 9 cents per shock. His affidavits recites acts of waste to the farm including the cutting of young and growing timber. This farm is within a short distance, about three miles, from the city of Indianapolis and lies on the summit of the Watershed between Fall Creek and White River, which have their confluence in Indianapolis. The farm lies in the direct course of the rapid developement of Indianapolis. Proximate to it lands sell at $1,000.00 and more per acre. For many years Dora E. Rooker and William V. Rooker had cultured forestry on the farm, a tract of about twenty acres being set apart for that purpose.

Two and a half years intervened between the date of the colorable sale of the Marion County lands to the Triangle Realty Company and the taking of possession thereunder. The sale appears to have been made in February, 1919, (supra: Defendants petition for Writ of Assistance). In the affidavit of James L. Wheatley, marked "Exhibit C," filed with the motion for a rule to show cause, it appears that possession was taken in September, 1921. The 200 young trees destroyed are estimated on the basis that each of the trees was worth $50.00 to the farm, as growing timber.

The respondents other than Grant Caca, Raymond Caca, Thomas West, Lee West and Henry West have appropriated and converted to their own use 60 acres of fallow upland on said Marion County farm to the damage of William V. Rooker and Dora E. Rooker $20.00 per acre. The wrongful acts committed to and upon said Marion County farm were committed by all the respondents conspiring and confederating together, other than Grant Caca, Raymond Caca, Thomas West, Lee West and Henry West.

THE DAMAGES TO THE HAMILTON COUNTY FARM

When the respondents set out upon their course of "dogging" these petitioners respondents conspiring and confederating together caused and procured Thomas West, the tenant, to attorn to respondent and to remove from the Hamilton County lands of the trust estate the landlord's share of the corn crop grown thereon during the season of 1921. There were approximately 110 acres of this corn and a reasonable estimate of its

yield per acre is 60 bushels, one-half of which was to be delivered to Dora E. Rooker according to the lease under which West had rented the farm. This estimate accords to Dora E. Rooker 3,000 bushels of corn and its present farm and feeding value is one dollar per bushel. Petitioners are not advised as to where all this corn was disposed of but they know and aver the fact to be that a material part of it was delivered to and converted by the Caca Elevator Company, owned and operated by Grant Caca and Raymond Caca. When this unlawful removal of corn began from the farm with deliveries to the Caca Elevator Company these petitioners protested to Thomas West and his sons, Lee West and Henry West and, also, they warned Grant Caca and Raymond Caca both orally and by letter that the removal of said corn by said West was unlawful and that the said Cacas, and their elevators, should not take in said corn. All these protests and warnings were wholly disregarded.

Since the pretended lease to West he has cut and removed growing timber and logs of the reasonable value of $50.00. He has taken and used a dwelling house and barn on the farm, the reasonable rental value of which house and barn is $15.00 per month; he has torn down and removed forty rods of fencing to the injury of the premises $100.00. He has appropriated and converted 35 acres of stalk pasture of the reasonable worth and value of $100.00; he has appropriated and converted to his own use one hundred acres of blue grass pasture of the reasonable worth and value of five dollars per acre per month; he has pastured forty-five acres of alfalfa meadow and used a part of it for storage to the damage of the meadow ten dollars per acre and to the damage of Dora E. Rooker $450.00; he has appropriated and converted to his own use forty-five acres of fallow upland for the crop season of 1922 to the damage of Dora E. Rooker $15.00 per acre; he has appropriated and converted to his own use eighty acres of fallow river bottom land for the crop season of 1922 to the damage of Dora E. Rooker $20.00 per acre.

We leave the fees of counsel and the cost and expense of these proceedings for further statement.

EXHIBIT C.

James L. Wheatley in his affidavit relates the manner in which possession of the Marion County lands of the trust estate was taken by the respondents. His affidavit follows:

State of Indiana }
County of Marion } ss

James L. Wheatley being first duly sworn upon his oath says:

My name is James L. Wheatley, age sixty-eight years, farmer by occupation and I now reside in Castleton, Lawrence Township in Marion County in the State of Indiana. I am acquainted with Dora E. Rooker and William V. Rooker and have known them at least forty (40) years. Am also acquainted with Charles E. Cox and Henry Seyfried, attorneys; also with J. Albert Smith of the Fidelity Trust Company; also Judson D. Moschelle and Amo Buck. For a good many years I resided about three-quarters of a mile distant from the farm of William V. Rooker and Dora E. Rooker, containing eighty (80) acres and situate on the dividing line between Lawrence and Washington Townships in said Marion County; the farm is known as the Rooker farm in its neighborhood; it is the same farm which was involved in the litigation in the Hamilton Circuit Court of Indiana between William V. Rooker and Dora E. Rooker, on one side, and the Fidelity Trust Company on the other. I attended the trial of that case at Noblesville, Hamilton County, Indiana, in July, 1918, and I testified there as a witness I have been the tenant of William V. Rooker and Dora E. Rooker in possession of that farm for five (5) years under a contract extended from year to year, and once for two years, with rent payable in grain. I was the tenant under Mr. and Mrs. Rooker in possession of said farm in 1921 and had out on the farm that year just about thirty acres of corn. It was a very heavy crop. I had gathered one full wagonload of corn and another about two-thirds full when Charles E. Cox, Amo Buck and J. Albert Smith came to me where I was working in the field and ordered me to stop gathering my corn and to get off the farm at once and not to return upon it. Charles E. Cox did the talking for his party. After he ordered me to stop gathering my corn and get off the place and not come

back, he threatened me with arrest. His whole conversation as nearly as I can recall it was as follows:

He came up to my wagon in the field and asked me "What are you doing here?" I answered, "I am gathering corn." He said, "Whose corn?" I said, "My corn. I planted and cultivated this corn and it is mine. My contract with Mr. Rooker was that I was to have half and he half." He said, "You have no right to shuck this corn." I said, "I know I have a right to shuck this corn." He said, "If you shuck another bushel you'll be arrested right here. I have the papers right with me and if you come back on here I'll know it right away and come back for you. You have no right here and I want you to get off right away. I want you to stay off this farm."

I called his attention to one hundred fifty (150) shocks of fodder, corn and all, which I had paid nine cents (9c) a shock to have cut. I asked, "What am I going to do about my fodder; don't I get my fodder?" He said, "You don't get anything." Cox was angry and talked loud and had a crowd with him and I thought the best thing I could do was to leave the field. On the day before that, Amo Buck ordered me off the farm. Buck told me Moschelle hired him and put him in the house on the farm. Buck got into the house during my absence from the farm. Moschelle is at the farm quite often. He or his son is out there pretty near every day.

Basing my estimate on the yield where I gathered the load and two-thirds of corn which I got before they stopped me, it is my best judgment that the yield of that corn on the farm would average eighty (80) bushels to the acre. I have been a farmer all my life and have gathered corn every year for the last fifty-five (55) years. I know how corn runs to the acre in yield. They got about twenty-five hundred (2500) bushels of my corn on that farm out of which I should have delivered one-half to Mr. Rooker. The corn has at this time a farm or feeding value of One ($1.00) Dollar per bushel. They also took ten tons of straw which was on the farm. It is worth Eleven ($11.00) Dollars a ton loose and unbaled. They have had the use of the house and barn since last September. The

rental value of the house and barn is Fifteen ($15.00) Dollars per month. Along about last February Buck took some men into Mr. Rooker's young forest and they cut down a large number of young and growing trees. The trees ran from thirty (30) feet to sixty (60) feet in height and were straight as a shingle. They were six (6) to eight (8) inches in diameter at the stump. They were Maple, Elm, Ash, Oak and other kinds. I saw the pile when they brought it to the barn yard. There were in my best judgment at least two hundred (200) of the trees. Mr. Rooker's young forest looks pretty thin now in places. It was the only forest of just that kind in the whole neighborhood. It is slightly more than three miles, I don't think it is quite four miles, from the farm to the Indianapolis City Limits. The city is building out that way pretty fast. Moschelle is now talking of selling the farm. They are now breaking the ground for this year's crop but not all my corn has been gathered. Buck hauled two loads of the corn to Castleton and got pay for one load, but when Mr. McComas, the elevator man learned where the corn came from he refused to pay Buck for the second load and Buck took it back to the farm.

And further affiant saith not.

James L. Wheatley

Subscribed and sworn to before me this 3rd day of May, 1922. Witness my hand and official seal.

F. O. Baker
Notary Public

My Commission expires July 13, 1924.

Wherefore these petitioners pray judgment, that a rule to show cause be entered herein and a citation issue forthwith to the respondents Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as Trustee of the estate of Dora E Rooker to appear at the bar of this Honorable Court at a time to be appointed and to be named in said citation and show cause if any why a commitment for contempt should not issue herein against them; why the damages of petitioners should not be assessed as in said petition prayed; why the possession of said premises should not

forthwith and entirely be restored to Dora E. Rooker and William V. Rooker; why justice should not in all respects be done to said petitioners and why said respondents should not be committed to prison until they shall have fully and completely performed the order and judgment of the Court in the premises and until they shall have been discharged according to law.

And wherefore these petitioners pray judgment, that a rule to show cause be entered herein and a citation issue forthwith to the respondents Fidelity Trust Company in its corporate capacity proper, Fidelity Trust Company as trustee of the estate of Dora E. Rooker, William M. Fogarty, James McNulty, J. Albert Smith, James G. Flaherty, Triangle Realty Company, Henry Seyfried, Charles E. Cox, Fred E. Hines, Judson D. Moschelle, Anna K. Moschelle, Amo Buck, Grant Caca, Raymond Caca, Thomas West, Lee West, and Henry West, and to each of them to appear at the bar of this Honorable Court at a time to be appointed and to be named in said citation and show cause, if any, why an attachment for contempt of this court should not issue herein against them; why upon the hearing and determination of said matter they should not be adjudged guilty of contempt of this court and punished as the cause of justice may require.

William Velpeau Rooker,
Attorney for Petitioners.

Floyd G. Christian,
Ralph H. Waltz,
Of counsel.

Dora E. Rooker and William V. Rooker being each duly sworn upon their oaths say that they are the petitioners named in the foregoing petition; that said petition is true in substance and in fact.

And further affiants saith not.

Dora E. Rooker.
William V. Rooker.

Subscribed in my presence and sworn to before me this 13th day of May, 1922. Witness my hand and official seal.

William H. Howard,
Notary Public.

My Commission expires May 9, 1923.

Supreme Court, U. S.
FILED
MAY 15 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 684 [redacted] 1921

PENDING ON [redacted] CERTIORARI

285

LAW No. [redacted] OCTOBER TERM 1921

ON WRIT OF ERROR

PETITIONERS' BRIEFS ON PETITION FOR SUPPLEMENTAL WRITS OF ERROR AND CERTIORARI

DORA E. ROOKER — WILLIAM V. ROOKER

Petitioners

VS.

FIDELITY TRUST CO., in its Corporate Capacity Proper — FIDELITY TRUST CO., as trustee of the Estate of Dora E. Rooker

Respondents

FLOYD G. CHRISTIAN, RALPH H. WALTZ, *of Counsel.*

WILLIAM VELPEAU ROOKER
Attorney for Petitioners

LEVEY, PRINTER.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 634 October Term 1921

PENDING ON PETITION FOR CERTIORARI

Law No. 785 October Term 1921

ON WRIT OF ERROR

Petitioners' Briefs Petition For Supplemental Writs of Error and of Certiorari

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STATEMENT OF THE CASE

I

There is a petition for supplemental writ of error to be directed to the Hamilton Circuit Court of Indiana which, assuming to act under the pretended authority of that same opinion, judgment and mandate of the Supreme Court of Indiana, which is here for review and determination, has taken certain proceedings to the prejudice and damage of Dora E. Rooker and William V. Rooker and upon which proceedings certain Federal questions are presented.

There is a petition for a supplemental writ of certiorari to be directed to the Hamilton Circuit Court of Indiana which assuming to act under the pretended authority of that same opinion, judgment and mandate of the Supreme Court of Indiana which is here for review and determination has taken certain proceedings to the prejudice and damage of Dora E. Rooker and William V. Rooker and upon which certain Federal questions are presented.

These supplemental Federal Questions are of two classes viz:

1. Those which involve the right of the Hamilton Circuit Court to share concurrent jurisdiction with this Court and to proceed with the determination of juridical issues in a cause whose subject matter and whose parties are in the jurisdiction of this court.

2. Those which involve a construction of the opinion, judgment and mandate of the Supreme Court of Indiana in this cause to the effect that the trustee was not in fact and in law a trustee but was a purchaser in its own right, with no such remaining interest in Dora E. Rooker and William V. Rooker as should entitle them to any notice of proceedings in Court affecting the trust estate and its administration.

II

THE PETITION FOR A SUPPLEMENTAL WRIT OF ERROR

The Petition for a supplemental writ of error, omitting the formal parts, is as follows:

IN THE SUPREME COURT OF THE UNITED STATES
LAW NO. 785

PETITION FOR SUPPLEMENTAL WRIT OF ERROR TO THE HAMILTON CIRCUIT COURT OF INDIANA

Dora E. Rooker,
William V. Rooker,
Plaintiffs in Error.
vs.
Fidelity Trust Company, in its
Corporate Capacity proper,
Fidelity Trust Company, as
Trustee of the estate of Dora E. Rooker,
Defendants in Error.

PETITION OF PLAINTIFFS IN ERROR FOR SUPPLEMENTAL WRIT OF ERROR WITH THEIR ASSIGNMENT OF ERROR

To the Honorable William H. Taft, Chief Justice of the United States, and the Associate Justices:

Dora E. Rooker and William V. Rooker, plaintiffs in error in the above entitled cause show by this their petition to this

Honorable Court that in the records, proceedings and decisions of the Hamilton Circuit Court of Indiana, said court pretending in the premises to be acting in accordance with the opinion, judgment and mandate of the Supreme Court of Indiana, the same being the highest court of said State in which a decision could be had in this suit, manifest errors have occurred greatly to the prejudice and damage of said Dora E. Rooker and William V. Rooker and that said occurrences in part have been subsequent to the time when this court acquired jurisdiction upon writ of error to review said judgment of the Supreme Court of Indiana, and that said occurrences in so far as they have not been subsequent to the time when this court acquired its said jurisdiction in said cause, nevertheless involve questions and issues which must be considered and determined by this court in said cause and petitioners say:

I

Dora E. Rooker and William V. Rooker make this their petition for a supplemental writ of error to be issued out of this court and directed to the Hamilton Circuit Court of Indiana to bring before this court for examination and determination the record, proceedings and judgment of said Hamilton Circuit Court in said cause.

II

Dora E. Rooker and William V. Rooker in this, their petition for a supplemental writ of error, hereby reaffirm every statement of fact and every recital and every prayer for relief, as stated, set forth and contained in their original petition for a writ of error and in their original assignment of errors herein, except as the same may be modified by this their petition for a supplemental writ of error and in their supplemental assignment of errors hereto attached and made a part of this petition, wherein they respectfully show this Honorable Court that there arise upon the record in the case of Dora E. Rooker and William V. Rooker, plaintiffs, against the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, defendants, in the Hamilton Circuit Court, certain Federal questions, to-wit:

(1.) The Hamilton Circuit Court of Indiana erred in its ruling order and judgment of February 27, 1922 in sustaining the petition of the Fidelity Trust Company for the approval of a lease made by that company with Thomas West wherein and whereby the Court took from these petitioners and delivered to said Fidelity Trust Company and Thomas West, the possession, use, rents and profits of certain lands being part of the trust estate of Dora E. Rooker situate in Hamilton County, said action of said Hamilton Circuit Court being taken without any notice whatsoever to the said Dora E. Rooker and William V. Rooker and without their knowledge and without the knowledge of either of them; that by said order, proceedings and judgment said Hamilton Circuit Court took the property of these petitioners without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(2.) Said Hamilton Circuit Court erred in its ruling order and judgment of March 2, 1922 in overruling the motion of said Dora E. Rooker and William V. Rooker to set aside and vacate the order and judgment of said Hamilton Circuit Court and the proceedings had thereon, made and entered into on, to-wit: the 27th day of February, 1922 wherein and whereby the said Hamilton Circuit Court approved a pretended lease of a part of the lands of the trust estate of Dora E. Rooker situate in said Hamilton County and without any notice whatsoever thereof to Dora E. Rooker and William V. Rooker and without the knowledge of Dora E. Rooker and William V. Rooker or either of them, in which said motion the said Dora E. Rooker and William V. Rooker showed to the court that they and neither of them had any knowledge or information concerning said order and judgment of February 27, 1922, and the proceedings had thereon until on the third day of March, 1922, and that because of the absence of notice to and information on the part of said Dora E. Rooker and William V. Rooker said order and judgment of February 27, 1922, and the proceedings had thereon, took the property of Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contra-

vention of the Fourteenth Amendment of the Constitution of the United States.

(3.) The Hamilton Circuit Court of Indiana erred in its order and judgment of February 27, 1922, and in the proceedings had thereon for the reason that at the time said order and judgment were made and entered and said proceedings had, the jurisdiction of said subject matter and of the parties thereto was vested exclusively in the Supreme Court of the United States by reason whereof said occurrences in said Hamilton Circuit Court were *coram non judice* and void, and by reason whereof said Hamilton Circuit Court took the property of Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the laws all in contravention of the Fourteenth Amendment of the Constitution of the United States.

(4.) That the Hamilton Circuit Court of Indiana erred in entertaining and exercising jurisdiction of divers motions and petitions for rule to show cause made and entered against Dora E. Rooker and William V. Rooker by the Fidelity Trust Company, Trustee, for the reason that the jurisdiction of the subject matter of said motions and petitions and of the parties thereto, was at the time, exclusively in the Supreme Court of United States by reason whereof said proceedings in said Hamilton Circuit Court were *coram non judice* and void and thereby said Hamilton Circuit Court took the property of Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the laws all in contravention of the Fourteenth Amendment of the Constitution of the United States.

III

Dora E. Rooker and William V. Rooker in this their petition, for a supplemental writ of error, further say and would show the court that divers errors to the prejudice and damage of these petitioners and in contravention of their rights under the Constitution and laws of the United States arising from the record of said Hamilton Circuit Court as more particularly stated and set forth in the assignment of errors made by said Dora E. Rooker and William V. Rooker in aid of this, their

petition, for a supplemental writ of error, and which assignment of errors marked exhibit A is hereto attached and made a part of this petition.

WHEREFORE, petitioners pray that a supplemental writ of error be allowed directed to the Hamilton Circuit Court of Indiana and that a transcript of the record, proceedings and judgment and the papers upon which the various rulings, orders and judgments were based, duly authenticated as provided by law, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such court in such cases made and provided and that the same may be by this Honorable Court inspected and corrected in accordance with law and justice.

William Velpeau Rooker,
Attorney for Petitioners.

State of Indiana)
County of Marion) ss

Dora E. Rooker and William V. Rooker being first duly sworn on their oath say that the facts stated in the foregoing petition are true, and further affiant saith not.

Dora E. Rooker.
William V. Rooker.

Subscribed in my presence and sworn to before me this 13th day of May, 1922. Witness my hand and official seal.

Wm. H. Howard,
[SEAL] Notary Public.

My commission expires May 9, 1923.

IN THE SUPREME COURT OF THE UNITED STATES
LAW NO. 785

OCTOBER TERM, 1921

SUPPLEMENTAL ERROR TO THE HAMILTON CIRCUIT COURT OF INDIANA

Dora E. Rooker,
William V. Rooker,
Plaintiffs in error.
vs.
Fidelity Trust Company in its corporate capacity proper,
Fidelity Trust Company as Trustee of the estate of Dora E. Rooker,
Defendants in error.

ASSIGNMENT OF ERRORS

Dora E. Rooker and William V. Rooker, plaintiffs in the cause above entitled, in connection with their petition for a supplemental writ of error herein to the Hamilton Circuit Court of Indiana, make this their supplemental assignment of errors against the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, defendants in error, and plaintiffs in error say: That these plaintiffs in error hereby reaffirm every statement of fact and every recital and every prayer for relief all as stated, set forth and contained in their original assignment of errors herein, except as the same may be modified by this their supplemental assignment of errors, and upon which supplemental assignment of errors they say that there is manifest error in the record, proceedings and judgment of the Hamilton Circuit Court of Indiana supplemental to the transfer of the jurisdiction of this cause to this court from the Supreme Court of Indiana in each of the particulars following: to-wit:

(1.) Said Hamilton Circuit Court erred in its ruling, order and judgment of March 7, 1922, in overruling the motion of the said Dora E. Rooker and William V. Rooker to set aside and vacate the order and judgment of said Hamilton Circuit Court, and the proceedings had thereon, made and entered on, to-wit: the 27th day of February, 1922, which motion was to the effect following:

(a.) That said order, and judgment and proceedings had therein were wholly void for the reason that same were made, entered and taken without any notice whatever to said Dora E. Rooker and William V. Rooker, or either of them, and wholly without their information and without the information of either of them.

(b.) That the jurisdiction of the parties to the subject matter of the proceedings stated in said motion was, and for many weeks continuously last past had been, exclusively in the Supreme Court of the United States, as must be and was apparent upon the facts in the premises, to-wit: The real estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker as plaintiffs, and the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at one time, but not since the year 1919, pending in said Hamilton Circuit Court as Cause No. 16,338; that on to-wit: the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in said Hamilton Circuit Court in said cause; that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that on, to-wit: the 22nd day of June, 1921, the Supreme Court of Indiana affirmed said judgment of said Hamilton Circuit Court and thereafter, on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on, to-wit: the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States and to the Justices thereof for a Writ of Error to the Supreme Court of Indiana in said cause and for a Writ of Certiorari to be directed to the Supreme Court of Indiana by the Supreme Court of the United States in said

cause; afterwards on, to-wit: the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker lodged in the office of the Clerk of the Supreme Court of the United States their transcript of said record, proceedings and judgment and at the same time the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a Writ of Certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana, and said petition was duly docketed as cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money, all as required by the rules and practice of the Supreme Court of the United States; that afterwards on, to-wit: the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States in said cause was issued on petition therefor of the said Dora E. Rooker and William V. Rooker, and at the same time said Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for payment of all damages and costs, which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker filed their citation and proof of service thereof in the office of the Clerk of the Supreme Court of Indiana; that on December 19, 1921, the said Dora E. Rooker and William V. Rooker lodged in said Clerk's office a copy of said Writ of Error in said cause for said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that on December 22, 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court in said cause on said Writ of Error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and was pending as Cause No. 785 October Term, 1921, in the Supreme Court of the United States at the time when said proceedings

were had as herein complained of in said Hamilton Circuit Court of Indiana in said cause.

(c.) That said order and judgment of February 27, 1921, of the Hamilton Circuit Court of Indiana and the proceedings had thereon to take the property of the said Dora E. Rooker and William V. Rooker without due process of law nad in denial of equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatsoever to the said Dora E. Rooker and William V. Rooker, or either of them, and without their having any knowledge whatsoever that the petition upon which said order and judgment were founded was filed and pending and being heard and determined in said Hamilton Circuit Court.

(d.) That said order and judgment and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, for the reason that said Hamilton Circuit Court, in which said order and judgment and the proceedings had thereon were taken, was wholly without jurisdiction of the parties and the subject matter of said petition for the reasons heretofore stated in recital of the steps taken to lodge and vest the jurisdiction of said parties and of said subject matter in the Supreme Court of the United States.

II

(a.) The Hamilton Circuit Court of Indiana erred in taking and exercising jurisdiction of the petition filed on the 27th day of February, 1922, said petition being to the effect following:

The Fidelity Trust Company, Trustee, represented to the court that said Trustee since the affirmance by the Supreme Court of Indiana of the decree of said Hamilton Circuit Court directing said Trustee to sell lands and tenements in Hamilton County, Indiana belonging to, and constituting a part of the trust estate of Dora E. Rooker, had made effort to sell said land and tenements but had not been able to do so and would not be able to do so before the beginning of the crop year on

March 1, 1922, for the reason that the plaintiffs, Dora E. Rooker and William V. Rooker, were now attempting to perfect an appeal of said cause from the Supreme Court of Indiana to the Supreme Court of the United States; that unless said Hamilton County lands of said trust estate were rented and farmed for the crop year 1922 it would cause loss and waste to said trust estate and that, therefore, said trustee had tentatively leased said lands to one Thomas West for said year on a basis of grain rent, which lease said trustee then and there tendered the court and asked that the same be approved by the court and ordered delivered.

b.) The Hamilton Circuit Court erred in sustaining the petition of the Fidelity Trust Company, Trustee, approving the lease of lands of said trust estate in said Hamilton County and in ordering said lease to be delivered and in placing said Thomas West in possession of said lands; that said order and judgment of said Hamilton Circuit Court takes the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

c.) The Hamilton Circuit Court of Indiana erred in disregarding and denying the additional answer of Dora E. Rooker and William V. Rooker to the petition of the Fidelity Trust Company as Trustee for a Writ of Assistance, which additional answer was filed in said Court on the 10th day of January, 1922, and was to the effect following, to-wit: That the said Dora E. Rooker and William V. Rooker made their plea by said answer to the jurisdiction of said Hamilton Circuit Court in the matter of the petition of the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker for a Writ of Assistance, the said plea of said Dora E. Rooker and William V. Rooker to the jurisdiction of said Hamilton Circuit Court in the premises being to the effect following, to-wit: That said Hamilton Circuit Court should proceed no further in the premises for the reason that the jurisdiction of the subject matter of the cause and the parties thereto was exclusively in the Supreme Court of the United States upon the facts following, to-wit: On the 12th day of October, 1921, this cause was pending in the Supreme Court of Indiana on appeal from the judgment of said Hamilton

Circuit Court and on said day said Supreme Court overruled a petition for rehearing; on the 14th day of December, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana, their petition for a Writ of Error to the Supreme Court of the United States in said cause and they filed at the same time and in the same place their Assignment of Errors; that thereupon said petition for a Writ of Error was presented to the Chief Justice of the Supreme Court of Indiana, who allowed the same and fixed the appeal bond at the penal sum of One Thousand Dollars, conditioned as provided by law for the payment of all damages and costs and approved the New Amsterdam Casualty Company of New York as surety on said bond; that thereupon said bond so fixed and conditioned was approved by the Chief Justice of the Supreme Court of Indiana and filed in said cause in the office of the Clerk of said Supreme Court; that on the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States issued in the name of the President, bearing teste of Noble C. Butler, Clerk of the District Court of the United States for the District of Indiana and the seal of said court, was filed by the said Dora E. Rooker and William V. Rooker in said cause in the office of the Clerk of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker as appellants in said cause to the Supreme Court of Indiana and as plaintiffs in error in said cause in the Supreme Court of the United States, filed in the office of the Clerk of the Supreme Court of Indiana their citation to the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of said Dora E. Rooker, commanding their presence as required by law in said cause in the Supreme Court of the United States and together with said citation said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana the acknowledgment of service of said citation on said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as said Trustee; that on the 19th day of December, 1921, said Dora E. Rooker and William V. Rooker as said appellants in the Supreme Court of Indiana, and the said plaintiffs in error in said cause in the Supreme

Court of the United States lodged for said defendants in error a copy of said writ of error in the office of the Clerk of the Supreme Court of Indiana; that on the 22nd day of December, 1921 said Dora E. Rooker and William V. Rooker filed their praecipe in the office of the Clerk of the Supreme Court of Indiana for a transcript of the record, proceedings and judgment of the Supreme Court of Indiana in said cause and with said praecipe they filed the acknowledgment of service thereof on said defendants in error; that said Dora E. Rooker and William V. Rooker upon information and belief stated that the Clerk of the Supreme Court of Indiana had at that time practically completed said transcript and had informed them that he would have said transcript in the office of the Clerk of the Supreme Court of the United States all within the time and manner provided by law.

III

That the Hamilton Circuit Court erred in accepting and retaining jurisdiction of a certain petition filed on the 16th day of November, 1921, in said cause by the Fidelity Trust Company as trustee for an attachment for contempt against Dora E. Rooker and William V. Rooker and for a Writ of Assistance to put said Fidelity Trust Company in possession of lands of the trust estate in said Hamilton County which said motion for attachment and petition for Writ of Assistance were in substance as follows to-wit:

"The Fidelity Trust Company, Trustee, defendant and cross-complainant in the above entitled cause, respectfully shows to the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiff's complaint and upon defendant's counter-claim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counter-claim and cross-complaint; that this court, on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee, then held the legal

title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

All of the west half of the north half of Section eighteen (18), township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad containing ninety-two (92) acres, more or less.

Also the southwest quarter of section seven (7), township eighteen (18) north, range five(5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods more or less to White River, thence southerly along said stream with meanderings thereof to a point 29 95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north of range four (4) east, containing forty acres, more or less, situated in Marion County, Indiana.

It was in said judgment and decree further adjudged and decreed that this defendant was then and there entitled on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

It was further in said judgment and decree adjudged and

decreed that said plaintiffs had then parted with all their title to said real estate, and the appurtenances thereunto belonging and the right to the possession thereof and the use, rents and profits thereof, and that they then had no interest therein other than an interest in the proceeds of the sale of said real estate contigent wholly upon a sale thereof at such a price that, after the payments of costs, liens, said judgment on account for $50,697 and the further reimbursement of said defendant trustee of such sum or sums as might accrue to it in the execution of said trust an unappropriated sum might still remain in defendant's hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds, aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and obstructive of the completion of the execution of said trust by said defendant and that said plaintiffs were then and there and thereby each and both perpetually enjoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said bonds.

It is further in said judgment and decree ordered and adjudged and decreed that said defendant, trustee, should proceed under the terms of the deeds and trust agreement under which it held title, to sell said lands and to proceed and first make sale of said Marion County lands and later to make sale of said Hamilton County lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or disapproval.

Said judgment and decree further directed the application of the proceeds of such sales.

And defendant further avers, that at the conclusion of the hearing and trial of said cause and before the finding and judgment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered

by the agreement of the parties to said action, plaintiffs and defendants, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton County lands and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn, and to collect the proceeds and apply and distribute the same under the direction of the court; that said trust company did appear in open court on said day and did accept said trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from said trust.

And defendant further avers that said defendants filed in the Supreme Court of Indiana a vocation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issued stayed execution on said judgment and that the same has been and remained in full force and effect and is now, and that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and thereafter plaintiffs filed a petition for a rehearing thereof which was on October 12, 1921, in all things overruled and said judgment became absolutely final.

And plaintiff avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure a purchaser and to sell said Marion County real estate; that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court; that such objections and exceptions were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay or proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained and is now

in full force and effect: that defendant did, pursuant to said order execute its deed by delivering to said Triangle Realty Company and received the consideration of said sale, to-wit, the sum of $16,000.

And defendant further avers that notwithstanding the aforesaid judgment and decree of December 21, 1918, said plaintiffs, Dora E. Rooker and William V. Rooker, have at all times since claimed to be the owners of said real estate and entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendants; that without right and without the knowledge of this defendant and without the knowledge or approval of the court said plaintiff procured said Wainwright Trust Company, receiver as aforesaid, to make leases to one West for the crop, years 1919 and 1920, of the tillable parts of said Hamilton County lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amcunt and value of which are at this time unknown to the defendant, and did deliver one-half thereof to said Dora E. Rooker and said William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that said plaintiff unlawfully and in violation of the decree of this court converted said crops to their own use; that in the year 1920 said plaintiffs without the knowledge of defendant or this court took the rental of said Hamilton County lands out of the hands of this court's receiver, said Wainwright Trust Company, and themselves rented the same to one Thomas West for a grain rent for the crop year 1921, providing therein that he should deliver the landlord's share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one-half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921 produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlords share thereof fifty tons of the value of $600.00, which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3000 bushels of corn of the net value of $1000 of which plaintiffs

are claiming one half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threatening said West with legal action if he does not comply with such demand and are seeking by threats and intimidation to prevent him from gathering his share of said corn if he does not so comply.

And defendant further avers that at the time of the sale of said Marion County land in 1919 as aforesaid there was then on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlords share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it all of which said tenant was then and there informed by defendant; that said plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's share of said crops and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant and to hold possession thereof as such and to deliver to them the landlord's share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of 1921, continue to do; that in the years 1919, 1920 and 1921 said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of , 1921, said purchaser received possession of said lands and put its own tenant in possession thereof whereupon on the

day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant was a trespasser on said premises and that he, Rooker was the owner thereof with the right to the possession and use thereof.

And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held possession of the dwellings and other appurtenances of said Hamilton County lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against said lands, including taxes, insurance etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiff's conduct and the depreciation of said property it can not now be sold at a price which will pay the costs and expenses and reimburse it fully for its outlay and interest.

And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton County lands and appurtenances which demand was refused by them and they and each of them refused to comply therewith.

And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn into the case, or involved in it or decided either by the Circuit Court of Hamilton County or the Supreme Court of Indiana; that said proposed appeal is

for the sole purpose of attempting to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

And defendant avers that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

Wherefore, defendant prays the court that said cause be redocketed and that this court's former judgment and decree may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurtenances and by putting defendant into possession thereof; and that a writ of assistance be awarded to defendant to put it in possession of said land and appurtenances and to oust said plaintiffs their agents, servants and all acting for and claiming under them, and defendant prays for all proper relief in the premises which a court of equity may accord."

IV

The Hamilton Circuit Court of Indiana erred in sustaining the demurrer of the Fidelity Trust Company as Trustee to the plea in abatement of Dora E. Rooker and William V. Rooker filed in said court under their special appearace to the petition for writ of assistance, etc. which plea in abatement was in substance, as follows:

Dora E. Rooker and William V. Rooker, hereby enter their special appearance to the "Petition for Writ of Assistance, etc." filed herein by the Fidelity Trust Company, Trustee, on the 16th day of November, 1921, for the sole purpose of pleading to the jurisdiction of this court over the subject matter of said petition and over the persons of these respondents to said petition and for cause these respondents say:

1. That these respondents claim the right and privilege to take the cause direct from the Supreme Court of Indiana to the Supreme Court of the United States for review upon writ of error and upon writ of certiorari; or either of said writs because of certain questions arising upon the decision and judgment of the Supreme Court of Indiana involving the rights of these respondents under the constitution and laws of the United States, to-wit:

A. That the Indiana Practice Act of March 15, 1913, as amended and approved March 5, 1915, entitled "An Act Concerning Proceedings in Civil and Criminal Cases" impairs the obligation of contracts, and of the contract involved in this suit in contravention of Article One of the Constitution of the United States.

B. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

C. That the decision and judgment of the Supreme Court of Indiana in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

D. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

E. That the decision and judgment of the Supreme Court of Indiana takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

2. That these respondents claim their right and privilege to take said cause directly to the Supreme Court of the United States without the intervention of this court pursuant of the judicial code as amended.

3. That heretofore on the 10th day of November, 1921, these respondents filed in the office of the Clerk of the Supreme Court of Indiana their praecipe in writing for a transcript of the record, proceedings and judgment of said Supreme Court presenting as it does present, the said Federal question involved therein, as hereinbefore stated; that prior to the filing of said praecipe these respondents paid to the said Clerk an estimate of the cost of said record; that said Clerk of the Supreme Court of Indiana informs these respondents, and upon such information they state the fact to be that said transcript will be completed and ready for delivery to them within the next ten days.

4. That these respondents have written a brief for the purpose of presenting their petition to said Supreme Court of the United States and to the Justice thereof, for a writ of certiorari and a writ of error, or either of said writs; that at the present time more than two hundred pages of said brief are printed and said brief is ready for completion when respondents obtain the transcript of said record from the Clerk of the Supreme Court of Indiana, so that, from said transcript, these respondents may insert in said brief the proper page reference to contents of said transcript.

5. That these respondents are pursuing with due diligence their effort to take said cause for review, as aforesaid, to the Supreme Court of the United States; that it is their purpose to perfect and accomplish their said endeavors and present said cause, as aforesaid, to the Supreme Court of the United States within the time required therefor by the laws of the United States.

6. That prior to the filing of this petition in this cause, these respondents orally informed said Fidelity Trust Company and its attorneys that this cause was to be presented for review as aforesaid to the Supreme Court of the United States; that thereafter and prior to the filing of this petition for a Writ of Assistance, as these respondents are informed and believe, and upon information and belief they state the fact to be, that Charles E. Cox, one of the attorneys for the Fidelity Trust Company in this cause, went to the office of the Clerk of the Supreme Court of Indiana and made an examination of the record and made notation of the entries in this cause and of the said praecipe of these respondents for this record.

WHEREFORE, these respondents say that this court is without jurisdiction in the premises and they demand judgment that this proceeding abate, and they pray for all proper relief."

V

The Hamilton Circuit Court erred in overruling the demurrer of Dora E. Rooker and William V. Rooker to the petition for a Writ of Assistance as amended, by the Fidelity Trust Company, as Trustee of the estate of Dora E. Rooker, said demurrer being upon the grounds, to-wit:

"That there is a defect of parties plaintiff in said petition in this, to-wit: That upon the proceedings and judgment recited in said petition and the record of this court pertaining thereto, it is apparent that said judgment is the joint judgment of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company, in its corporate capacity proper, is not a co-petitioner in said petition nor is it made a defendant to answer thereto nor in any wise required to assert its interest in the premises, nor is there any showing in said petition that said interest of the Fidelity Trust Company in its corporate capacity proper has been transferred to and is held by the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company in its corporate capacity proper should be joined as a co-petitioner in said petition or it should be named as a defendant thereto and the reasons shown why said Fidelity Trust Company in its corporate capacity proper fails to join in said petition.

2. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that the Wainwright Trust Company is receiver of the lands in controversy situate in Hamilton County in the State of Indiana; that said receiver is a necessary and proper person to these proceedings and said petition should require the Wainwright Trust Company to appear and answer as to its interest in the premises.

3. That there is a defect of the parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that Thomas West is tenant of the lands in controversy situate in Hamilton County in the State of Indiana; that said tenant is a necessary and proper person to these proceedings and said petition should require the said Thomas West to appear and answer as to his interests in the premises.

5. That said petition does not state facts sufficient to constitute a cause of action as a petition for a writ of assistance.

6. That said petition as amended is not verified.

MEMORANDUM

For their memorandum with their demurrer in respect of the insufficiency of said petition to state a cause of action these plaintiffs say:

1. That the judgment sued on is a joint judgment and can not be enforced singly.

2. That the Fidelity Trust Company, Trustee, is not the real party in interest.

3. That it is not shown that the Fidelity Trust Company in its corporate capacity proper withholds its consent from this proceedings.

4. That the Writ of Assistance is not a primary writ but is issued only in aid of a prior process of court and that no such process has been issued out of this court on this judgment.

5. That no execution ever has been issued on the judgment and decree of court mentioned in said petition."

VI

The Hamilton Circuit Court of Indiana had no jurisdiction to enter upon the execution of the mandate of the Supreme Court of Indiana pursuant of its opinion and judgment while the same was pending for review in the Supreme Court of the United States, and the proceedings had in said Hamilton Circuit Court in the premises were *coram non judice* and void.

VII

The Hamilton Circuit Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate because by their deeds of trust they had sold and conveyed the trust estate to the trustee in its own right and the Trustee had purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal

protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

VIII

The Hamilton Circuit Court of Indiana erred in accepting and applying opinions, judgments and mandates of the Supreme Court of Indiana as meaning and directing that Dora E. Rooker and William V. Rooker could, and should, be denied their day in court to redeem and defend the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate, because by their deeds of trust they had sold and conveyed the trust estate to the Trustee in its own right and the trustee and purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

IX

The Supreme Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem and defend the trust estate from the Trustee upon its repudiation of the trust agreement by holding that to entertain the objections of Dora E. Rooker and William V. Rooker to the illegality of the joint counter-claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker would work to the harm and prejudice and financial loss of the Trustee and to the undeserved gain of the said Dora E. Rooker and William V. Rooker and by said denial said Supreme Court of Indiana took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

X

The Hamilton Circuit Court of Indiana erred in accepting and applying the opinion, judgment and mandate of the

Supreme Court of Indiana as meaning that Dora E. Rooker and William V. Rooker could, and should, be denied their day in court to challenge the illegality of the joint counterclaim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora F. Rooker, because to entertain that challenge would work to the harm and prejudice of said Trustee and to the undeserved gain of said Dora E. Rooker and William V. Rooker, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR REVERSAL

WHEREFORE and upon consideration of the several supplemental errors herein assigned, as well as upon the errors assigned in the original assignment of errors, which are hereby reaffirmed, and because of the numerous errors apparent upon the face of the record all to the wrongful prejudice of these plaintiffs in error, they humbly pray that the judgment of the Supreme Court of Indiana and the judgment of the Hamilton Circuit Court of Indiana, be in all things reversed and the plaintiffs in error be awarded all proper relief.

William Velpeau Rooker,
Attorney for Plaintiffs in Error.

Floyd G. Christian,
Ralph H. Waltz,
Of Counsel

III

THE PETITION FOR A SUPPLEMENTAL WRIT OF CERTIORARI

The Petition for supplemental writ of certiorari, omitting the formal parts, is as follows:

Your petitioners respectfully show to this court that since the opinion, judgment and mandate of the Supreme Court of Indiana in this cause was filed in the office of the Clerk of the Hamilton Circuit Court of Indiana, said Hamilton Circuit Court unlawfully and without right has taken certain steps; has entertained certain motions, pleas and proceedings in pre-

tended contemplation of carrying out said mandate of the Supreme Court of Indiana, and thereupon, these petitioners make this their supplemental petition for a Writ of Certiorari in said cause to be directed to the Hamilton Circuit Court of Indiana, to-wit:

I

(1.) These petitioners now hereby reaffirm all the averments and they now seek all the relief stated in their original petition for Writ of Certiorari except as the same may be modified by this, their supplemental petition for a Writ of Certiorari wherein they respectfully show to this court:

(a.) That there arise upon the record in the case of Dora E. Rooker and William V. Rooker, plaintiffs, against the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, defendants, in the Hamilton Circuit Court of Indiana, certain Federal questions, to-wit:

(1.) Said Hamilton Circuit Court erred in its ruling, order and judgment of March 7, 1922, in overruling the motion of the said Dora E. Rooker and William V. Rooker to set aside and vacate the order and judgment of said Hamilton Circuit Court, and the proceedings had thereon, made and entered on to-wit: the 27th day of February, 1922, which motion was to the effect following:

(a.) That said order and judgment and proceedings had thereon were wholly void for the reason that the same were made, entered and taken without any notice whatever to said Dora E. Rooker and William V. Rooker, or either of them, and wholly without their information and without the information of either of them.

(b.) That the jurisdiction of the parties to the subject matter of the proceedings stated in said motion was, and for many weeks continuously last past had been, exclusively in the Supreme Court of the United States, as must be and was apparent upon the facts in the premises, to-wit: The real estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are a part of the subject matter of a controversy

between the said Dora E. Rooker and William V. Rooker, as plaintiffs, and the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at one time, but not since the year 1919, pending in said Hamilton Circuit Court as Cause No. 16,338; that on to-wit: the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in said Hamilton Circuit Court in said cause; that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that on, to-wit: the 22nd day of June, 1921, the Supreme Court of Indiana affirmed said judgment of said Hamilton Circuit Court and thereafter, on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on, to-wit: the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States and to the Justices thereof for a Writ of Error to the Supreme Court of Indiana in said cause and for a Writ of Certiorari to be directed to the Supreme Court of Indiana by the Supreme Court of the Unted States in said cause; afterwards, on to-wit: the 5th day of December, 1921 the said Dora E. Rooker and William V. Rooker lodged in the office of the Clerk of the Supreme Court of the United States their transcript of said record, proceedings and judgment and at the same time the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a Writ of Certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana, and said petition was duly docketed as cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money, all as required by the rules and practice of the Supreme Court of the

United States; that afterwards on, to-wit: the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States in said cause was issued on petition therefor of the said Dora E. Rooker and William V. Rooker, and at the same time said Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for the payment of all damages and costs, which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker filed their citation and proof of service thereof in the office of the Clerk of the Supreme Court of Indiana; that on December 19, 1921, the said Dora E. Rooker and William V. Rooker lodged in said Clerk's office a copy of said Writ of Error in said cause for said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that on December 22, 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court in said cause on said Writ of Error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and was pending as Cause No. 785, October Term, 1921, in the Supreme Court of the United States at the time when said proceedings were had, as herein complained of, in said Hamilton Circuit Court of Indiana in said cause.

(c.) That said order and judgment of February 27, 1921, of the Hamilton Circuit Court of Indiana and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatever to the said Dora E. Rooker and William V. Rooker, or either of them, and without their having any knowledge whatsoever that the petition upon which said order and judgment were founded

was filed and pending and being heard and determined in said Hamilton Circuit Court.

(d.) That said order and judgment and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said Hamilton Circuit Court in which said order and judgment and the proceedings had thereon were taken, was wholly without jurisdiction of the parties and the subject matter of said petition for the reasons heretofore stated in recital of the steps taken to lodge and vest the jurisdiction of said parties and of said subject matter in the Supreme Court of the United States.

II

(a.) The Hamilton Circuit Court of Indiana erred in taking and exercising jurisdiction of the petition filed on the 27th day of February, 1922, said petition being to the effect following:

The Fidelity Trust Company, Trustee, represented to the court that said Trustee since the affirmance by the Supreme Court of Indiana of the decree of said Hamilton Circuit Court directing said Trustee to sell the lands and tenements in Hamilton County, Indiana, belonging to and constituting a part of the trust estate of Dora E. Rooker, had made effort to sell said land and tenements but had not been able to do so and would not be able to do so before the beginning of the crop year on March 1, 1922, for the reason that the plaintiffs, Dora E. Rooker and William V. Rooker, were now attempting to perfect an appeal of said cause from the Supreme Court of Indiana to the Supreme Court of the United States; that unless said Hamilton County lands of said trust estate were rented and farmed for the crop year 1922 it would cause loss and waste to said trust estate and that, therefore, said trustee had tentatively leased said lands to one Thomas West for said year on a basis of grain rent, which lease said trustee then and there tendered the court and asked that the same be approved by the court and ordered delivered.

(b.) The Hamilton Circuit Court erred in sustaining the petition of the Fidelity Trust Company, Trustee, approving

the lease of lands of said trust estate in said Hamilton County and in ordering said lease to be delivered and in placing said Thomas West in possession of said lands; that said order and judgment of said Hamilton Circuit Court takes the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(c.) The Hamilton Circuit Court of Indiana erred in disregarding and denying the additional answer of Dora E. Rooker and William V. Rooker to the petition of the Fidelity Trust Company as Trustee for a Writ of Assistance, which additional answer was filed in said Court on the 10th day of January, 1922, and was to the effect following, to-wit: That the said Dora E. Rooker and William V. Rooker made their plea by said answer to the jurisdiction of said Hamilton Circuit Court in the matter of the petition of the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker for a Writ of Assistance, the said plea of Dora E. Rooker and William V. Rooker to the jurisdiction of said Hamilton Circuit Court in the premises being to the effect following: to-wit: That said Hamilton Circuit Court should proceed no further in the premises for the reason that the jurisdiction of the subject matter of the cause and the parties thereto was exclusively in the Supreme Court of the United States upon the facts following, to-wit: On the 12th day of October, 1921, this cause was pending in the Supreme Court of Indiana on appeal from the judgment of said Hamilton Circuit Court and on said day said Supreme Court overruled a petition for rehearing; on the 14th day of December, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana, their petition for a Writ of Error to the Supreme Court of the United States in said cause and they filed at the same time and in the same place their Assignment of Errors; that thereupon said petition for a Writ of Error was presented to the Chief Justice of the Supreme Court of Indiana, who allowed the same and fixed the appeal bond at the penal sum of One Thousand Dollars, conditioned as provided by law for the payment of all damages and costs and approved the New Amsterdam Casualty Company of New

York as surety on the bond; that thereupon said bond so fixed and conditioned was approved by the Chief Justice of the Supreme Court of Indiana and filed in said cause in the office of the Clerk of said Supreme Court; that on the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States issued in the name of the President, bearing teste of Noble C. Butler, Clerk of the District Court of the United States for the District of Indiana and the seal of said court, was filed by the said Dora E. Rooker and William V. Rooker in said cause in the office of the Clerk of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker as appellants in said cause to the Supreme Court of Indiana and as plaintiffs in error in said cause in the Supreme Court of the United States, filed in the office of the Clerk of the Supreme Court of Indiana their citation to the Fidelity Trust Company in its corporate capacity proper and the Fidelty Trust Company as Trustee of the estate of the said Dora E. Rooker, commanding their presence as required by law in said cause in the Supreme Court of the United States and together with said citation said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana the acknowledgment of service of said citation on said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as said Trustee; that on the 19th day of December, 1921, said Dora E. Rooker and William V. Rooker as said appellants in the Supreme Court of Indiana, and the said plaintiffs in error in said cause in the Supreme Court of the United States lodged for said defendants in error a copy of said writ of error in the office of the Clerk of the Supreme Court of Indiana; that on the 22nd day of December, 1921, said Dora E. Rooker and William V. Rooker filed their praecipe in the office of the Clerk of the Supreme Court of Indiana for a transcript of the record, proceedings and judgment of the Supreme Court of Indiana in said cause and with said praecipe they filed the acknowledgment of service thereof on said defendants in error; that said Dora E. Rooker and William V. Rooker upon information and belief stated that the Clerk of the Supreme Court of Indiana had at that time practically completed said transcript and had informed them that he would have said

transcript in the office of the Clerk of the Supreme Court of the United States all within the time and manner provided by law.

III

That the Hamilton Circuit Court erred in accepting and retaining jurisdiction of a certain petition filed on the 16th day of November, 1921, in said cause by the Fidelity Trust Company as Trustee for an attachment for contempt against Dora E. Rooker and William V. Rooker and for a Writ of Assistance to put said Fidelity Trust Company in possession of lands of the trust estate in said Hamilton County which said motion for attachment and petition for Writ of Assistance were in substance as follows, to-wit:

"The Fidelity Trust Company, Trustee, defendant and cross-complainant in the above entitled cause, respectfully shows to the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiff's complaint and upon defendant's counterclaim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counterclaim and cross-complaint; that this court on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee, then held the legal title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

"All of the West half of the north half of section eighteen (18), township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad containing ninety-two (92) acres, more or less.

"Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake

Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

"Also the southeast quarter of section twelve (12) township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

"Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty two rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 29.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County Indiana.

"And the southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north of range four (4) east, containing forty (40) acres, more or less, situated in Marion County, Indiana.

"It was in said judgment and decree further adjudged and decreed that this defendant was then and there entitled on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

"It was further in said judgment and decree adjudged and decreed that said plaintiffs had then parted with all their title to said real estate, and the appurtenances thereunto belonging and the right to the possession thereof, and the use, rents and profits thereof, and that they then had no interest therein other than an interest in the proceeds of the sale of said real estate contingent wholly upon a sale thereof at such a price that, after the payments of costs, liens, said judgment on account for $50,697, and the further reimburse-

ment of said defendant trustee of such sum or sums as might accrue to it in the execution of said trust an unappropriated sum might still remain in defendant's hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and obstructive of the completion of the execution of said trust by said defendant and that said plaintiffs were then and thereby each and both perpetually enjoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give possession and from in any manner interfering with, disputing, or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands.

"It is further in said judgment and decree ordered and adjudged and decreed that said defendant, trustee, should proceed under the terms of the deeds and trust agreement under which it held title, to sell said lands and to proceed and first make sale of said Marion County lands and later to make sale of said Hamilton County lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or disapproval.

"Said judgment and decree further directed the application of the proceeds of such sales.

"And further defendant avers that at the conclusion of the hearing and trial of said cause and before the finding and judgment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered by the agreement of the parties to said action, plaintiffs and defendants, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton county lands, collect the proceeds and apply and distribute the same under the direction of the court; that said trust company did appear in open court on said day and did accept said

trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from said trust.

"And defendant further avers that said defendants filed in the Supreme Court of Indiana a vacation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issued to stay execution on said judgment and that the same has been and remained in full force and effect and is now, and that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and thereafter plaintiffs filed a petition for a rehearing thereof which was on October 12, 1921, in all things overruled, and said judgment became absolutely final.

"And plaintiff avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure a purchaser and to sell said Marion County real estate; that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court as that such objections and exceptions were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay of proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained, and is now in full force and effect; that defendant did, pursuant to said order execute its deed by delivering the same to said Triangle Realty Company and received the consideration of said sale, to-wit, the sum of $16,000.

"And defendant further avers that notwithstanding the aforesaid judgment and decree of December 21, 1918, said plaintiffs Dora E. Rooker and William V. Rooker, have at all times since claimed to be the owners of the said real estate and

entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendants; that without right and without the knowledge of this defendant and without the knowledge or approval of the court said plaintiff procured said Wainwright Trust Company receiver as aforesaid, to make leases to one West for the crop years 1919 and 1920, of the tillable parts of said Hamilton County lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amount and value of which are at this time unknown to the defendant, and did deliver one-half thereof to said Dora E. Rooker and William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that said plaintiff unlawfully and in violation of the decree of this court converted said crops to their own use; that in the year 1920 said plaintiff without the knowledge of defendant or this court took the rental of said Hamilton County lands out of the hands of the court's receiver, said Wainwright Trust Company, and themselves rented the same to one Thomas West for a grain rent for the crop year 1921 providing therein that he should deliver the landlord's share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one-half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921 produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlord's share thereof fifty tons of the value of $600.00, which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3,000 bushels of corn of the net value of $1,000 of which plaintiffs are claiming one-half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threatening said West with legal action if he does not comply with such demand and are seeking by threats and intimidation to prevent him from gathering his share of said corn if he does not so comply.

"And defendant further avers that at the time of the sale of said Marion County land in 1919 as aforesaid there was then

on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs; that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlord's share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it all of which said tenant was then and there informed by defendant; that said plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's share of said crops and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant and to hold possession thereof as such and to deliver to them the landlord's share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of 1921, continue to do so; that in the years 1919, 1920 and 1921, said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time, and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of 1921, said purchaser received possession of said lands and put its own tenant in possession thereof, thereupon on the day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant, was a trespasser on said premises and that he, Rooker, was the owner thereof with the right to the possession and use thereof.

"And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held

possession of the dwellings and other appurtenances of said Hamilton County lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against said lands, including taxes, insurance, etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiffs' conduct and the depreciation of said property it can not now be sold at a price which will pay the costs and expenses and reimburse it fully for its outlay and interest.

"And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton County lands and appurtenances which demand was refused by them and they and each of them refuses to comply therewith.

"And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn into the case, or involved in it or decided either by the Circuit Court of Hamilton County or the Supreme Court of Indiana; that said proposed appeal is for the sole purpose of attempting to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

"And defendant avers that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

"Wherefore defendant prays the court that said cause be redocketed and that this court's former judgment and decree

may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurtenances and by putting defendant into possession thereof; and that a Writ of Assistance be awarded to defendant to put it in possession of said land and appurtenances and to oust said plaintiffs their agents, servants and all acting for and claiming under them, and defendant prays for all proper relief in the premises which a court of equity may accord."

IV

The Hamilton Circuit Court of Indiana erred in sustaining the demurrer of the Fidelity Trust Company as Trustee to the plea in abatement of Dora E. Rooker and William V. Rooker filed in said court under their special appearance to the petition for Writ of Assistance, etc. which plea in abatement was in substance, as follows:

"Dora E. Rooker and William V. Rooker, hereby enter their special appearance to the 'Petition for Writ of Assistance, etc.' filed herein by the Fidelity Trust Company, Trustee, on the 16th day of November, 1921, for the sole purpose of pleading to the jurisdiction of this court over the subject matter of said petition and over the persons of these respondents to said petition and for cause these respondents say:

"1. That these respondents claim the right and privilege to take this cause direct from the Supreme Court of Indiana to the Supreme Court of the United States for review upon Writ of Error and upon Writ of Certiorari, or either of said writs, because of certain questions arising upon the decision and judgment of the Supreme Court of Indiana involving the rights of these respondents under the constitution and laws of the United States, to-wit:

"A. That the Indiana Practice Act of March 15, 1913, as amended and approved March 5, 1915, entitled 'An Act Concerning Proceedings in Civil and Criminal Cases' impairs the obligation of contracts, and of the contract involved in this suit in contravention of Article One of the Constitution of the United States.

"B. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit

Court in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

"C. That the decision and judgment of the Supreme Court of Indiana in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

"D. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

"E. That the decision and judgment of the Supreme Court of Indiana takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

"2. That these respondents claim their right and privilege to take said cause directly to the Supreme Court of the United States without the intervention of this court pursuant of the judicial code as amended.

"3. That heretofore on the 10th day of November, 1921, these respondents filed in the office of the Clerk of the Supreme Court of Indiana their praecipe in writing for a transcript of the record, proceedings and judgment of said Supreme Court presenting as it does present, the said Federal questions involved therein, as hereinbefore stated; that prior to the filing of said praecipe these respondents paid to the said Clerk an estimate of the cost of said record; that said Clerk of the Supreme Court of Indiana informs these respondents, and upon such information they state the fact to be, that said transcript will be completed and ready for delivery to them within the next ten days.

"4. That these respondents have written a brief for the purpose of presenting their petition to said Supreme Court of the United States and to the Justices thereof, for a Writ of Certiorari and a Writ of Error, or either of said writs; that at the present time more than two hundred pages of said brief are printed and said brief is ready for completion when respondents obtain the transcript of said record from the Clerk of the Supreme Court of Indiana, so that from said transcript,

these respondents may insert in said brief the proper page references to contents of said transcript.

"5. That these respondents are pursuing with due diligence their effort to take said cause for review, as aforesaid, to the Supreme Court of the United States; that it is their purpose to effect and accomplish their said endeavors and present said cause, as aforesaid, to the Supreme Court of the United States within the time required therefor by the laws of the United States.

"6. That prior to the filing of this petition in this cause, these respondents orally informed said Fidelity Trust Company and its attorneys that this cause was to be presented for review as aforesaid to the Supreme Court of the United States; that thereafter and prior to the filing of this petition for a Writ of Assistance, as these respondents are informed and believe, and upon information and belief, they state the fact to be, that Charles E. Cox, one of the attorneys of the Fidelity Trust Company in this cause, went to the office of the Clerk of the Supreme Court of Indiana and made an examination of the record and made notation of the entries in this cause and of the said praecipe of these respondents for this record.

"WHEREFORE, these respondents say that this court is without jurisdiction in the premises and they demand judgment that this proceeding abate and they pray for all proper relief."

V

The Hamilton Circuit Court erred in overruling the demurrer of Dora E. Rooker and William V. Rooker to the petition for a Writ of Assistance, as amended, of the Fidelity Trust Company, as Trustee of the estate of Dora E. Rooker, said demurrer being upon the grounds, to-wit:

"That there is a defect of parties plaintiff in said petition in this, to-wit: That upon the proceedings and judgment recited in said petition and the record of this court pertaining thereto, it is apparent that said judgment is the joint judgment of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company, in its

corporate capacity proper, is not a co-petitioner nor is it made a defendant to answer thereto nor in any wise required to assert its interest in the premises, nor is there any showing in said petition that said interest of the Fidelity Trust Company in its corporate capacity proper has been transferred to and is held by the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company in its corporate capacity proper should be joined as a co-petitioner in said petition or it should be named as a defendant thereto and the reasons shown why said Fidelity Trust Company in its corporate capacity proper fails to join in said petition.

"2. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that the Wainwright Trust Company is receiver of the lands in controversy situate in Hamilton County in the State of Indiana; that said receiver is a necessary and proper party to these proceedings and said petition should require the Wainwright Trust Company to appear and answer as to its interest in the premises.

"3. That there is a defect of the parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that Thomas West is tenant of the lands in controversy situate in Hamilton County in the State of Indiana; that said tenant is a necessary and proper party to these proceedings and said petition should require the said Thomas West to appear and answer as to his interests in the premises.

"5. That said petition does not state facts sufficient to constitute a cause of action as a petition for a writ of assistance.

"6. That said petition as amended is not verified.

MEMORANDUM

"For their memorandum with their demurrer in respect of the insufficiency of said petition to state a cause of action these plaintiffs say:

"1. That the judgment sued on is a joint judgment and can not be enforced singly.

"2. That the Fidelity Trust Company, Trustee, is not the real party in interest.

"3. That it is not shown that the Fidelity Trust Company in its corporate capacity proper withholds its consent from this proceedings.

"4. That the Writ of Assistance is not a primary writ but is issued only in aid of a prior process of court and that no such process has been issued out of this court on this judgment.

"5. That no execution ever has been issued on the judgment and decree of court mentioned in said petition."

VI

The Hamilton Circuit Court of Indiana had no jurisdiction to enter upon the execution of the mandate of the Supreme Court of Indiana pursuant of its opinion and judgment while the same was pending for review in the Supreme Court of the United States and the proceedings had in said Hamilton Circuit Court in the premises were *coram non judice* and void.

VII

The Hamilton Circuit Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate because by their deeds of trust they had sold and conveyed the trust estate to the Trustee in its own right and the Trustee had purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

VIII

The Hamilton Circuit Court of Indiana erred in accepting and applying the opinion, judgment and mandate of the Supreme Court of Indiana as meaning and directing that Dora E. Rooker and William V. Rooker could, and should, be denied their day in court to redeem and defend the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V.

Rooker were incompetent and disqualified to redeem and defend the trust estate, because by their deeds of trust they had sold and conveyed the trust estate to the Trustee in its own right and the Trustee had purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

IX

The Supreme Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem from the Trustee, and defend the trust estate, upon its repudiation of the trust agreement by holding that to entertain the objections of Dora E. Rooker and William V. Rooker to the illegality of the joint counter-claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the trust estate of Dora E. Rooker would work to the harm and prejudice and financial loss of the Trustee and to the undeserved gain of the said Dora E. Rooker and William V. Rooker and by said denial said Supreme Court of Indiana took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

X

The Hamilton Circuit Court of Indiana erred in accepting and applying the opinion, judgment and mandate of the Supreme Court of Indiana as meaning that Dora E. Rooker and William V. Rooker could, and should be denied their day in court to challenge the illegality of the joint counter-claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, because to entertain that challenge would work to the harm and prejudice of said Trustee and to the undeserved gain of said Dora E. Rooker and William V. Rooker, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker

without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, your petitioners are advised and believe that said proceedings and each of them of the Hamilton Circuit Court in said cause are erroneous in the particulars hereinbefore enumerated, and that this Honorable Court should require the case to be certified to for its review and determination in conformity with the provision of Section 237 of the Judicial Code as amended, said proceedings in said Hamilton Circuit Court being taken under the pretended authority of the opinion, judgement and mandate of the Supreme Court of Indiana in said cause, the same being a final decision by the highest court of Indiana competent to decide said case. A certified copy of the entire record of the Hamilton Circuit Court of Indiana in said cause under said pretended opinion, judgment and mandate is hereby furnished, attached to and made part of this application and marked Exhibit B in compliance with Rule 37 of this Honorable Court.

WHEREFORE, your petitioners respectfully pray that a Supplemental Writ of Certiorari may be issued out of and under the seal, of this court directed to the Hamilton Circuit Court of Indiana commanding said court to certify and send to this court on a certain day to be therein designated a full, true and complete transcript of the record and proceedings of said Hamilton Circuit Court in said cause entitled: Dora E. Rooker, William V. Rooker, Plaintiffs, vs. Fidelity Trust Company in Its Corporate Capacity Proper, Fidelity Trust Company, Trustee of the Estate of Dora E. Rooker, defendants, to the end that said cause may be reviewed and determined by this court as provided by Section 237 of the Judicial Code as amended; or, that your petitioners may have such other or proper relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that said judgment of the Supreme Court of Indiana in said case and every part thereof may be reviewed by this Honorable Court, and that said proceedings, orders and judgments of said Hamilton Circuit Court in said case

and each part thereof, may be reviewed by this Honorable Court, and in all things reversed.

William Velpeau Rooker,
Attorney for Petitioners.

F. G. Christian
Ralph H. Waltz
of Counsel

State of Indiana }
County of Hamilton } ss

Dora E. Rooker and William V. Rooker being first duly sworn upon their oaths say that they are the petitioners in the foregoing petition; that said petition is true in substance and in fact; that as to the matters of law therein stated these petitioners have taken the advice of counsel; that the errors of law therein complained are substantial and the claims thereof are well founded and that said errors of law are clearly to the prejudice and damage of these plaintiffs and that these petitioners are entitled to have relief from said errors which is in the petition prayed, and further affiants saith not.

Dora E. Rooker.
William V. Rooker.

Subscribed in my presence and sworn to before me, J. D. Hill, Clerk of the Hamilton Circuit Court of Indiana this 29th day of April, 1922.

Witness my hand and seal of said Court.

(Seal: Hamilton Circuit Court of Indiana)

J. D. Hill,
Clerk, Hamilton Circuit Court.

IV

There is a transcript of the record proceedings and judgments of the Hamilton Circuit Court, acting in the premises under the opinion, judgment and mandate of the Supreme Court of Indiana, lodged in the office of the Clerk of the Court and because of the summary nature of these proceedings printed copies of that transcript have been prepared and filed herewith by these petitioners. To that transcript and to those printed copies reference is made throughout this brief for the better identification of the issues, for the manner in which the Federal questions arose and for greater certainty.

PETITIONERS BRIEF OF THE LAW

FEDERAL RIGHT ASSERTED

Dora E. Rooker and William V. Rooker contend that their right to come to this court is a Federal right which may be specially set up and claimed and that when such right is specially set up and claimed within the terms of the judicial code, it raises a Federal question which this court will determine with its own standards of inquiry and judgment; that such Federal question when properly presented upon the record, as was done in the Hamilton Circuit Court in these proceedings, should have halted the State Court. The issue was tendered with a plea in abatement challenging the right of the Circuit Court to proceed further in the face of the steps being taken to have the judgment of the Supreme Court of the State reviewed by the Supreme Court of the United States. There was a demurrer to this plea in abatement and the demurrer admitted the truth of the averments in the plea. The Court sustained the demurrer and rendered judgment accordingly. Thus it became a judgment of law upon admitted facts in the Circuit Court that the Federal right which was specially set up and claimed could be disregarded by the State Court. This Court frequently has held, notably in removal cases, that the assertion of the Federal right of removal ousted the jurisdiction of the State Court and that it was for the Federal Court to determine whether the assertion of the Federal right had been timely and providently made.

Kern v. Huidekoper, 103 U. S. 485; 26 Law SS. 354.

The right of Dora E. Rooker to address her appeal to this Court for the protection of her rights under the constitution was inchoate from the time this controversy began. Even before that event occurred, the constitution of the United States attended her agreements with the trustee just as the sovereignty of a vessel goes with its flag and that constitution was the supreme law of the land. The attendance of this law upon the citizen and his property is a like effective whether the form of attendance be inchoate or vested.

Rose v. Himely, 4 Cranch 241; 2 Law Ed. 608.

Gelston v. Hoyt, 3 Wheat, 246; 4 Law Ed. 381.

Cherokee Nation v. Georgia, 5 Pet. 1; 8 Law Ed. 25.

Hickey's Lessee v. Stewart, 3 How. 750; 11 Law Ed. 814.
Williamson v. Berry, 8 How. 495; 12 Law Ed. 1170.
Tennessee v. Davis, 100 U. S. 257; 25 Law Ed. 648.
Strauder v. West Virginia, 100 U. S. 303; 25 Law Ed. 664.
In re Neagle, 135 U. S. 1; 34 Law Ed. 99.

FEDERAL QUESTIONS PRESENTED TIMELY

It is not now too late for Dora E. Rooker and William V. Rooker to insist that they have an interest in the affected estate which is competent to give them that standing before the law which will entitle them to their day in court on issues affecting the trust estate and their interest therein. The law's definitions of the relations which exist (1) between a trustee and *cestui que trust* and (2) between a *cestui que trust* and the trust estate are definite. In this case they were irrevocably fixed by the first decision of the Supreme Court of Indiana.

On the second appeal to the Supreme Court that tribunal refused to consider the plaintiff's; challenge of the defendants' counter-claim as being unlawful. This refusal by the Supreme Court of Indiana was stated in express terms.

This Court has held that where the Supreme Court of a state refuses to consider a part of a case, there is a denial of the equal protection of the law and a taking of property without due process of law in contravention of the Fourteenth Amendment of the constitution of the United States and that in such circumstances, the Federal question is presented timely if it be presented in a petition for rehearing.

Mr. Justice Holmes speaking for the Court to this point in Saunders v. Shaw, 244 U. S. 317; 61 Law Ed. 1163, said: "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough—but when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant

was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles 227 U. S. 278; 57 Law Ed. 510. It happens that shortly after the Supreme Court had declined to entertain the petition for a rehearing, the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more we could have done."

In the instant case the plaintiffs went farther than was required by the rule as Mr. Justice Holmes has stated it. Here, too, the assignment of errors presented to the Chief Justice of the Supreme Court of the State, when he allowed the writ of error, set up the Federal question. The assertion of the claim was repeated and reiterated when the Circuit Court, on the remand, acted in contravention of the Constitutional rights of Dora E. Rooker and William V. Rooker.

THE LAW OF TRUSTS IS THE LAW OF THE CASE

On the former appeal to the Supreme Court of Indiana, the trust deeds and contracts herein issued were held to constitute a single transaction and that transaction to be the creation of a trust, and not a mortgage.

Rooker v. Fidelity Trust Co., 185 Ind. 172.

That decision fixed forever the character of the instruments as between the parties and precluded the defendants in error from asserting now that they bought the property not upon a trust but outright and that Dora E. Rooker no longer had any interest in the trust estate and was not therefore entitled to notice of proceedings in court affecting the final estate.

Dodge v. Gaylord, 53 Ind. 365.

Brunson v. Henry, 152 Ind. 310.

Westfall v. Wait, 165 Ind. 353.

This rule of the law of the case estops the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee from changing its theory as it has attempted to do. At first the Trust Company claimed to be a mortgagee; now it claims to have been an outright purchaser.

Dora E. Rooker having transferred to the trustee the property comprising the trust estate and having made the conveyance upon the condition and terms stated in an agreement which created a trust and was executory, a right of action in her behalf arose when the defendant attempted to withdraw from or repudiate the contract.

Roehm v. Horst, 178 U. S. 1; 44 Law Ed. 953.

The Eliza Liner, 199 U. S. 125; 50 Law Ed. 115.

Citizens National Bank v. Davisson 229 U. S. 215; 57 Law Ed. 1153.

Central Trust Co. v. Chicago Auditorium Assn., 240 U. S. 581; 60 Law Ed. 811.

United States v. Purcell Envelope Co., 249 U. S. 313; 63 Law Ed. 620.

Kurtz v. Frank, 76 Ind. 594.

Adams v. Byerly, 123 Ind. 368.

Riley v. Walker, 6 Ind. App. 622.

Indiana Life Ins. Co. v. Reed, 54 Ind. App. 450.

Oklahoma Vinegar Co. v. Carter, 116 Ga. 145; 94 Am. St. Rep. 112.

Smith v. Georgia L. Co., 113 Ga. 977.

Spiers v. Union Drop Forge Co., 180 Mass. 92.

Emory Mfg. Co. v. Salomon, 178 Mass. 583.

Gearty v. Mayor etc., 171 N. Y. 71.

Mutual etc. Assn. v. Taylor, 99 Va. 213.

The trust agreement was clearly defined, it created a trust and was executory. The term of contract in respect of the element of time may fix an ultimate date or it may contemplate a definite service to be performed. The obligations of such contracts are mutual.

Vinton v. Baldwin, 88 Ind. 104.

Foulks v. Falls, 91 Ind. 315.

French v. Cunningham, 149 Ind. 632.

Tatterson v. Suffolk Mfg. Co., 106 Mass. 56.

Pfeister v. Western Union, 282 Ill. 69.

The trust agreement was bilateral and therefore, not exposed to ex parte rescission.

I Williston on Contracts, Secs. 65, 68.

III Williston on Contracts, Secs. 1301-1303.

Harson v. Pike, 16 Ind. 140.

Coffman v. Keight'y, 24 Ind. 509.
Board v. Bearss, 25 Ind. 110.
Hayden v. Souger, 56 Ind. 42.
Sithin v. Board, 66 Ind. 109.
Board v. Hammond, 83 Ind. 453.
Vigo Agricultural Soc. v. Brumfiel, 102 Ind. 146.
Everman v. Hymen, 26 Ind. App. 165.

ACTS OF REPUDIATION WERE ACTIONABLE WRONGS

The assertion by the Fidelity Trust Company that the trust deed was a mortgage was itself a repudiation of the trust agreement and a renunciation of the trusteeship and the trust. This act of repudiation was intensified and made certain with the foreclosure of the trust deed as a mortgage and with the execution sale of the trust estate, made on the decree of foreclosure, and with the taking and recording of sheriffs' deeds based upon the execution sales. So, here, now, the declaration of the trustee that it acquired the property by purchase outright and that Dora E. Rooker and William V. Rooker parted with all their interest except in the proceeds of sale, if any sale was made upon terms adequate to leave a residue is, also, a repudiation of the trust agreement. But if the Trust Company should wish to retract its earlier acts of repudiations it must do so within the terms of the law. It may reach a place of repentance in its mad career of loot and spoilation and when that point is arrived at the Trust Company must offer to do justice.

NO LOCUS POENITENTIAE

This doctrine of *Locus Poenitentiae* has been disregarded wholly by the Fidelity Trust Company in its corporate capacity proper and as trustee of the estate of Dora E. Rooker in this case. It has made no restitution and offered none for the great wrongs it has committed—

1. In contesting claims which as trustee it should have paid.
2. In repudiating the trust, with notice on October 28, 1912.
3. In suing to foreclose the trust deed as a mortgage.
4. In procuring witnesses to testify to sustain the trust deed as a mortgage.
5. In procuring the trial court in the first instance to decree

that the trust deed was a mortgage and to foreclose the same accordingly.

6. In purchasing and procuring the assignment of liens and asserting the same against the trust estate.

7. In having execution sale made of the trust estate on the decree of foreclosure.

8. In purchasing all the property of the trust estate at sheriff sale on decree foreclosing the trust deed as a mortgage.

9. In acquiring title, hostile to the trust to all the property of the trust estate by sheriff's deed on sale under the decree foreclosing the trust agreement as a mortgage.

10. In suing to enforce against Dora E. Rooker, specific liens against the trust estate which had been purchased by the Fidelity Company during the years while it claimed to be a mortgagee and not a trustee.

11. In imposing upon Dora E. Rooker the duty to preserve the trust and the trust estate against waste and the many attempts of the Fidelity Company to convert and appropriate.

12. In further repudiating the trust agreement by engaging in a conspiracy with the Fidelity Company in its corporate capacity proper, whereby they jointly were to sue Dora E. Rooker, as they did sue, on the claim of the Trust Company as a banker and creditor of the trustee; to aver as they did aver in their joint counter claim, asserting the claim of the banker that she had no interest in the property because she had sold it to the trustee and the trustee had acquired title as a purchaser in its own right; to persuade the trial court to adopt as they did persuade it to adopt their theory that Mrs. Rooker had no interest and therefore no right to complain of the waste which had been committed, no right to complain of the expense which had been imposed upon her in form of attorneys fees and expenses in defending the trust and preserving the trust estate; no right to complain of the long delay in carrying out the trust, by reason of which delay there had been an interest accumulation of approximately thirty per cent of the value of the Trust Company's pretended claim; to prevail upon the Court as they did prevail upon the Court not to consider any of her grievances on the theory that she being without any interest had no right to complain and upon an adjudication to that effect to allow judgment against the trust estate in the full

sum of the padded and false claim of the banker, with not the slightest offset in favor of Mrs. Rooker or the trust estate.

In their zeal the conspiring Trust Company and trustee went too far because if Dora E. Rooker had no interest, then she was incompetent to defend the trust estate and if she was incompetent to defend the trust estate then the trust estate had no defendant and no day in Court and the judgments of the Court below are in contravention of the due process and the equal protection clause of the Fourteenth Amendment and are void.

In the principle of *Locus Poenitentiae* it is assumed that a time may come when a wrong doer may wish to repent. Where that situation arises the law will extend its grace. The wrong doer may upon terms and the tender of justice be allowed to change his position. But here there has been no offer to do justice. On the contrary, their policy has been to intensify the wrongs which attended their previous conduct. They seek to make the procedure in their case unilateral and to depend upon their caprice. The courts will not aid them in that policy.

St. Louis etc. R. Co., v. Terre Haute etc. R. Co., 145 U. S. 393; 36 Law Ed. 748.

The Eliza Lines, 199 U. S. 119; 50 Law Ed. 115.

Harriman v. Northern Securities Co., 197 U. S. 244; 49 Law Ed. 739.

Union Pacific R. Co. v. Durant, 95 U. S. 576; 24 Law Ed. 391.

No place appears for the principle of *Locus Poenitentiae* in the program of the defendants in error in this case.

At first the program of the defendants was to deny the trust deed upon the theory that it was a mortgage. Being defeated in that theory with the first decision of the Supreme Court of Indiana (Rooker v. Fidelity Trust Company, 185 Ind. 172) the defendants next adopted the theory that the trust deed and the agreement which went with them, were the conveyance of an absolute estate in fee simple to the Trust Company as a purchaser in its own right with no conditions except terms of payment. In this respect they contend that Mrs. Rooker sold the property absolutely. An analogy for their present theory may be found in Mr. Harriman's experience with the Northern Securities Company as the exposition of that experience was made by this court in Harriman v. Northern Securities Company ,197 U. S. 244; 49 Law Ed. 739. In that case Mr. Harri-

man endeavored to participate in the dissolution of the Securities Company upon the theory that it acquired the holdings of his property as a trustee rather than as a purchaser upon an absolute sale made by him with no condition imposed except as to price. In Harriman's Case this Court approved the findings of the lower court made upon the testimony of Mr. Harriman himself that there was no trust but that there had been a sale made by him and a purchase by the Securities Company with no conditions imposed upon the transfer of the property except as to price.

But in this case Mrs. Rooker is suing to redeem the property from a trustee who had repudiated. In her complaint at the threshold of this case she asked the Court for an accounting, to ascertain any amount due to the delinquent trustee and to fix an upset time for the payment of whatever might be found to be due to the Trust Company. In order that the security of the lien of the Trust Company, as well as the liens of all other creditors of the trust estate, might not be impaired Mrs. Rooker asked the court to sequester her trust estate with a receivership until the proceedings in the case could be brought to judgment and the judgment performed. In taking this position Mrs. Rooker's attitude toward the trust estate was similar to the attitude of Mrs Burgess toward her property in the case of Graffam v. Burgess, 117 U. S. 180; 29 Law Ed. 839.

To remove any question as to the purpose of Mrs. Rooker and her husband and the theory of the action we here quote the prayer of her complaint, to wit:

"Wherefore these plaintiffs demand judgment, that an accounting be had of the extent of the interest of said Fidelity Trust Company in and to said property and that a reasonable time be fixed in which said indebtedness may be paid and that in the meantime a receiver be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement and to perform with respect thereto such duties as the Court may from time to time direct and that damages sustained by said Dora E. Rooker because of the non-performance of said contract be ascertained, and that she be given judgment accordingly; that said co-defendants of said Fidelity Trust Company be required to set up their several respective interests in the premises or on default that they be

forever barred and shut out and that the Clerk of this Court upon the rendition of such judgment be ordered and directed to enter of record the release and satisfaction of each and every such lien and incumbrance and plaintiffs pray for all proper relief." Transcript p. 16.

The trust deeds and the trust agreement are sufficiently stated in the second opinion of the Supreme Court of Indiana from which this cause is prosecuted. This second opinion of the Indiana Supreme Court is set out in the transcript in the instant proceedings for Writs of Certiorari and Error, and in the brief cited Supra said opinion of the Supreme Court of Indiana appears at pages 105-124. Transcript of Main Case pp. 29-36.

Two obvious purposes attend the policy of the Fidelity Trust Company in this case viz.

1. To acquire for itself the trust estate.

2. To avoid compensating Mrs. Rooker for the loss and expense entailed upon her by the misconduct of the trustee. These items included the waste of the trust estate because of years of idleness when the Trust Company, contending that it was only a mortgage, refused to perform its obligations as trustee to maintain the trust estate and the business conducted thereon; the many years of delinquency in which the trustee failed to perform the trust contract by sale of the trust property under the trust agreement, and because of which delay there now are interest accumulations asserted against the trust estate approximating $20,000.00; the fees of counsel and the experience and cost of this litigation since October 30, 1912, when Mrs. Rooker began her effort to redeem the trust property and rescue the trust from the delinquent trustee; the fabrication of claims against the trust estate and their acquisition by the Trust Company at one time as a pretended "Mortgage" and now as a pretended "purchase of the trust estate."

Of course, if the Trust Company was strictly a mortgagee and not a trustee, it could avoid liability for the wrongs committed and admitted, with the defense that the duties of a mortgagee extended only to the loaning of money and not to the maintainance of the trust estate. After the mortgage theory was destroyed by the first decision of the Supreme Court of Indiana, then the "purchaser" theory was adopted. Of course if the Trust Company purchased the property and Mrs.

Rooker sold it with no conditions except price and terms of payment then Mrs. Rooker would have difficulty in establishing that she continued to have a right to complain of the waste of property by the person to whom she had sold. If the theory was accepted that Mrs. Rooker had sold the trust property to the Trust Company with no conditions except as to price and terms of payments, so that she no longer had any interest in the trust estate then it is obvious that a Court might proceed without notice to Mrs. Rooker to hear and determine matters of most vital concern affecting the trust property. And this the Hamilton Circuit Court is now doing in disregard both of the jurisdiction of the court and of the rights of Mrs. Rooker and her husband under the Fourteenth Amendment of the Constitution of the United States.

It would seem apparent, therefore, that the action of the Hamilton Circuit Court of Indiana in proceeding in disregard of the jurisdiction of this court and in disregard of Mrs. Rooker's rights under the Fourteenth Amendment of the Constitution of the United States, and basing the right so to proceed upon the second decision of the Supreme Court of Indiana, presents the whole case for consideration here.

NATURE OF THE TRUST CONTRACT

What is the nature of Dora E. Rooker's interest in the premises? She has parted with an interest in an estate of great value. She says that the conveyance of that estate was conditional and that the condition was the creation of a trust. The Fidelity Trust Company says that Mrs. Rooker parted with the fee simple title and that as to the trust estate there were no conditions in the transfer; that Dora E. Rooker has no interest in the trust estate at the present time, nor has she had any interest therein since the deeds of conveyance and the trust agreement were made. The Fidelity Trust Company's position upon the record is an admission that the trust agreement has not been performed because there was no trust agreement to be performed; that as to this non-performance it is contended by the Trust Company that Dora E. Rooker, stands only as a creditor of the Trust Company, just as she would stand as a creditor of any other person to whom she had made a general sale of property without prepayment of the

purchase price. In a relative sense it therefore may be said when we come to consider the Trust Company's position that we are to inquire, who is Dora E. Rooker's debtor? Is she, a creditor of the trust estate? Or is she not the creditor of the trust estate but the creditor only of the Trust Company the person to whom her property was conveyed upon an executory contract which has not been performed? Of course, in making this inquiry, Dora E. Rooker does not admit that the Trust Company's interpretation is correct and that her position has been reduced to the Status of a mere creditor. The inquiry is invited to show its fallacy through the medium of illustration and to make clear the position contended for by the Trust Company. Dora E. Rooker contends, (1) That she is the equitable owner of the trust estate and (2) that upon the acts of repudiation by the Trust Company, trustee, she became the enforced trustee of her own trust estate for the use and benefit of those who, relying upon the trust deeds and the trust agreement, became creditors of the trust estate.

REPUDIATION TRANSFERRED THE RIGHTS OF THE TRUST COMPANY FROM THOSE OF A TRUSTEE TO THOSE OF A CREDITOR OF THE TRUST ESTATE

If Dora E. Rooker's contention be correct that by the proceedings in the premises the Trust repudiated the trust agreement to the end that the trust fell by force of law to Mrs. Rooker, for preservation at least if not for execution, then and in that event, the Trust Company became and now it is no more than a creditor of the trust estate upon a claim exposed to all the legal defenses which could be used properly against any other creditor of the same class. It would not be proper, of course, for Mrs. Rooker to continue to act as the trustee of her own estate and she has at no time sought to do that, but the exigencies of the case impose this duty upon her as a matter of law rather than as a matter of contract until a new trustee may be appointed. As to the period between the lawful dominion of the trustee who repudiated and the prospective dominion of the trustee who is to be designated, Mrs. Rooker stands as bridge or passage way through which the trust estate may pass from the delinquent trustee to its successor in office, and to this effect she now is the forced trustee of her own estate as well as its equitable owner.

A similar question, in some respects, was before this court in Harriman v. Northern Securities Company, 197 U. S. 244; 49 Law Ed. 739. In that case, following a decree disclosing the Northern Securities Company as reproachful to the Act of Congress prohibiting combinations or conspiracies in restraint of trade and commerce, (193 U. S. 197; 48 Law Ed. 679) Harriman and others asserting that the Northern Securities Company was a trustee of specific property rather than a purchaser in its own right, sought to recover specific property they had conveyed to the Securities Company. The Circuit Court held upon the facts that the Northern Securities Company was not a trustee but a purchaser and that Harriman was a general creditor of the Securities Company rather than the equitable owner of an estate lodged in the Securities Company as trustee. The Court below, and this Court alike, were cautious in their statement of the facts and the law, to the end that it should appear clearly that the decision was founded upon the facts. There was no controversy that the Securities Company might have attempted to take over the affected property as trustee rather than as purchaser, but upon the facts it had not done so.

THE FALSE THEORY OF PURCHASER

The fundamental error in the proceedings in this case, and one upon which Dora E. Rooker was denied the equal protection of the laws and her property was taken in denial of due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, traces to the false premise that the estate of Dora E. Rooker was sold by her and was purchased by the Trust Company in its own right without condition other than price and payment and that the conveyance was not made upon a trust.

It might, of course, be true that Dora E. Rooker should not be notified of proceedings in court concerning the affected property if she had sold that property to the Trust Company and had retained no right, title and interest and the Trust Company in its own right had purchased that property from Mrs. Rooker with no conditions except price and terms of payment. If that premise were true, instead of false, Mrs. Rooker would be a general creditor of the Trust Company

rather than the equitable owner of the trust estate. In that event the utmost specific interest she could have in the trust estate might be a vendor's lien upon it to secure the payment of the purchase price.

JUDGMENT MADE FALSE BY CONSPIRACY

To illustrate in another way the infirmity of the judgment against the trust estate rendered on the joint counter-claim of the trustee and its banker, let us suppose that the trustee and its banker conspired to aid one another in an action against the trust estate and to that end they filed their complaint against the admittedly fictitious John Doe averring the outright sale of the property by its former owner to the trustee in its own right, and the advancement of the bankers' funds to the trustee, wherefore they asked judgment jointly against the trust estate. Suppose, farther, that while the John Doe suit was pending Dora E. Rooker had intervened and claimed to be the equitable owner of the trust estate and had asked the Court to direct an inquiry as to her interest. This inquiry is called an examination *Pro Interesse Suo* (Daniell Ch. P. C. XXVI, sec. 7, p. 157). Suppose further that Dora E. Rooker's petition was heard and it was adjudged that she had no interest in the trust estate would such adjudication be permitted to sustain the judgment against the trust estate on the John Doe complaint on the theory that Dora E. Rooker's intervention, though it had been defeated, had submitted the trust estate to judicial inquiry for all purposes and therefore the trust estate could not complain of the John Doe judgment on the theory that in it the trust estate was denied due process of law and its property taken in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States. Did not the court's adjudication that Dora E. Rooker had no interest conclude the Court, as well as all the parties, to the effect that Dora E. Rooker was incompetent to defend the trust estate and therefore had not defended it? If Dora E. Rooker had not defended the trust estate because she was incompetent to do so, then, is not that adjudication conclusive that in so far as Dora E. Rooker was concerned and her interests affected, the trust estate had not been defended. In the absence of a cross bill by the Trust

Company as a banker against the Trust Company as trustee, or vice versa, the judgment rendered in this case shows that the trust estate was not in court as a defendant at the joint suit of the Trust Company in its corporate capacity and the Trust Company as trustee of the estate of Dora E. Rooker, and therefore the judgment on the joint complaint in favor of the conspirators was *coram non judice* and void.

Krippendorf v. Hyde, 110 U. S. 276; 28 Law Ed. 145.

Pacific R. Co. v. Missouri R. Co., 111 U. S. 505; 28 Law Ed. 498.

Morgans Louisiana etc. Co. v. Texas etc. R. Co., 137 U. S. 171; 34 Law Ed. 625.

The money judgment in this case wherein the trustee and its banker sued the trust estate was clearly beyond the issue. It is settled that one defendant cannot have a decree against a codefendant without a cross bill, with proper prayer and process or answer as in an original suit. There was no cross bill in this suit as between the trustee and its banker.

Elliot v. Stevenson, 21 Ind. 359.

Sims v. Burk, 109 Ind. 214.

Webb v. John Hancock etc. Co., 162 Ind. 616.

Smith v. Woolfolk, 115 U. S. 143; 29 Law Ed. 357.

But in this case the Trustee conspiring with its banker to fix the false claim of the latter as a judgment against the trust estate sued Dora E. Rooker and William V. Rooker as fictitious and false defendants asserting them to have no interest in the trust estate but averring that they falsely claimed to have. There was no cross petition between the trustee and its banker, the Trust Company in its corporate capacity proper upon which there could be an adjudication as between them of the amount of the bankers claim or of the trustees interest, estate and power.

FALSE THEORY OF PURCHASER DEMONSTRATED BY THE COURT

It was upon this false theory that Dora E. Rooker was only a general creditor of the Trust Company, rather than the equitable owner of the trust estate, that the following recent proceedings were had in this cause which denied Mrs. Rooker the equal protection of the laws and took her property without

due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

First: On February 27, 1922, the Trust Company filed its petition in the Hamilton Circuit Court, "For leave to enter into a lease contract with one Thomas West, for the lands held by it under the terms of the trust deed herein for the year 1922." The transcript exhibits the petition but it does not exhibit the lease the same having been withheld from record by the Trust Company and by West. The lease was on the same day approved and on March 1, 1922, West was put in possession. No notice of these proceedings was given to Dora E. Rooker or William V. Rooker and the first knowledge either of them had was on the afternoon of March 3, 1922, when West informed Mrs. Rooker and her daughter that they were trespassers in their home and that they must surrender possession to him forthwith.

On March 4, 1922, Dora E. Rooker and William V. Rooker, "specially appearing herein for the purpose only of this motion" moved the Court "to set aside and vacate the order and judgment and proceedings had thereon, made and entered herein on Court the 27th day of February, 1922, and for cause the said Dora E. Rooker and William V. Rooker say:

"1. That said order and judgment and the proceedings had thereon are wholly void for the reason that the same were made, entered and taken wholly without any notice whatever to the said Dora E. Rooker and William V. Rooker, or either of them, and wholly without their information and without the information of either of them.

"2. That the jurisdiction of the parties to the subject matter of the Proceedings herein complained of is and for many weeks continuously last past has been exclusively in the Supreme Court of the United States as must be and is apparent upon the facts in the premises, to-wit: The real estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker as plaintiffs and the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, as defendants, which said con-

troversy was at that time but not since the year 1919, pending in this Court as cause No. 16,338; there on, to-wit, the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in this court in said cause: that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of this court; that on, to-wit, the 22nd day of June, 1921, the Supreme Court of Indiana affirmed said judgment of this Court and thereafter on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on to-wit, the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States, and to the justice thereof, for a writ of error to the Supreme Court of Indiana in said cause; that afterward on, to-wit, the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker lodged in the office of the Clerk of the Supreme Court of the United States their transcript of said record proceedings and judgment and at the same time said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a writ of Certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana, and said petition was duly docketed as a cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money all as required by the rules and practice of the Supreme Court of the United States; that afterward on, to-wit, the 15th day of December, 1921, the writ of error of the Supreme Court of the United States in said cause was issued on the petition therefor of the said Dora E. Rooker and William V. Rooker and at the same time Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for the payment of all damages and costs, which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana;

that on the 17th day of December, 1921, Dora E. Rooker and William V. Rooker filed their citation, and the proof of service thereof, in the office of the Clerk of the Supreme Court of Indiana; that on December 19th, 1921, Dora E. Rooker and William V. Rooker lodged in said Clerks office a copy of said writ of error in said cause for said Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as trustee of the estate of Dora E. Rooker; that on December, 22nd. 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana, their praecipe for a transcript of the record proceedings and judgment of said Supreme Court in said cause on said writ of error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and is now pending as cause No. 785 October term, 1921, in the Supreme Court of the United States and for the better identification of said cause, and for greater certainty, the said Dora E. Rooker and William V. Rooker now make reference to said proceedings and judgment of this court in said cause No. 16328.

"3. That said order and judgment of February 27, 1921, and the proceedings had thereon take the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the 14th Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatsoever to the said Dora E. Rooker and William V. Rooker, or either of them and without their having any knowledge whatsoever that said petition upon which said order and judgment were founded was filed and pending and being heard and determined in this Court. That the first time said Dora E. Rooker and William V. Rooker, or either of them learned of said order, proceedings and judgment of February 27, 1922, was on the afternoon of March 3, 1922.

"4. That said order and judgment, and the proceedings had thereon take the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the 14th Amendment of the Constitution of the United States, for the

reason that the court in which said order and judgment and the proceedings had thereon were taken, was wholly without jurisdiction of the parties and subject matter of said petition for the reasons hereinbefore stated in recital of the steps taken to lodge and vest the jurisdiction over said parties and over said subject matter in the Supreme Court of the United States.

"Wherefore the said Dora E. Rooker and William V. Rooker pray judgment of this court that said order and judgment and the proceedings had thereon of February 27, 1922, be adjudged and held to be null and void and they pray that this court proceed no further, and they ask for all proper relief."

The motion was duly verified by Dora E. Rooker and William V. Rooker.

Notice was given to the adversary parties and they appeared on March 7, 1922, but they offered no pleadings. The Court without issued joined, and without affidavits or evidence denied the motion of Dora E Rooker and William V. Rooker to vacate the order of and judgment of February 27, 1922, and allowed the lease to remain in effect. The Courts attention was called to the fact that no copy of the lease was on file or among the records of the Court. He said that West had a copy of the lease. The Clerk's transcript shows that the files of the Court remain without a copy of the lease.

It was the obvious purpose of the lease and of the Courts proceedings on February 27, 1922, to anticipate and forestall the action of this Court. The petition for approval of the lease contains the following averments in respect of this Court jurisdiction, viz:

"The Fidelity Trust Company, trustee, respectfully represents and shows to the Court that it has, since the affirmance by the Supreme Court of Indiana of the decree of this Court wherein and whereby your trustee was directed to sell the lands and tenements in Hamilton County, Indiana, described therein as provided in said decree and pursuant to the terms of the trust agreement involved in said action and decree, made effort to so sell said lands and tenements; that it has not been able to do so and will not be able to do so before the beginning of the crop year on March 1, 1922, for the reason that the plaintiffs are now attempting to perfect an appeal of

said cause from the Supreme Court of Indiana to the Supreme Court of the United States."

The trustees petition of February 27, 1922, was not signed by any attorney. It was subscribed; "Fidelity Trust Company trustee by J. Albert Smith, Vice-President." However Charles E. Cox presented the petition to the Court and obtained the entry of approval based on the petition. Charles E. Cox appeared, also and resisted the motion of Dora E. Rooker and William V. Rooker to vacate the order etc. on February 27, 1922.

SUPPLEMENTAL FEDERAL QUESTIONS

The proceedings in the Hamilton Circuit Court on the petition of the Fidelity Trust Company as trustee to divest the possession of Mrs. Rooker, the *cestui que trust*, of lands of the trust estate and vest the possession in West as tenant of the trustee, were void for want of jurisdiction and constituted a taking of Mrs. Rooker's property without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States for each of the following reasons:

Neither Mrs. Rooker nor any person in her behalf had any notice or knowledge of the proceedings. The term had gone by; the judgment in so far as it had any legality had become final and it could not be opened nor modified without notice; the lease was new matter which could not have been made a part of the original decree, although Dora E. Rooker and William V. Rooker were at that time in Court.

Smith v. Woolfolk, 115 U. S. 143; 29 Law Ed. 357.

Grover and Baker etc. Co. v. Radcliffe, 137 U. S. 287; 34 Law Ed. 670.

Reynolds v. Stockton, 140 U. S. 254; 35 Law Ed. 464.

Owens v. Henry, 161 U. S. 642; 40 Law Ed. 837.

Great Western etc. Co. v. Purdy, 162 U. S. 329; 40 Law Ed. 986.

Hovey v. Elliot, 167 U. S. 409; 42 Law Ed. 215.

Wetmore v. Karrick, 205 U. S. 141; 51 Law Ed. 745.

New York Life Ins. Co. v. Dunlevy, 241 U. S. 518; 60 Law Ed. 1140.

Where this court has jurisdiction it has the right to decide every question in the case.

Elliott v. Piersol, 1 Pet. 340.

Wilcox v. Jackson, 13 Pet. 511.

Hickey's Lessee v. Stewart, 3 How. 750; 11 Law Ed. 814.

The writ of Certiorari is a right of justice and it may issue where a writ of error would not lie.

Tidd Pr. Sec. 398.

Bacon, Abe. tit. certiorari

Ex Parte Chetwood, 165 U. S. 443; 41 Law Ed. 782.

Harriman v. Northern Securities Co., 197 U. S. 244; 49 Law Ed. 739.

It is proper procedure to make supplemental complaint and exposition of new matter occuring in the cause after the original steps were taken, and this is the rule whether on the one hand the supplemental matter is addressed to the substance of the original complaint or, on the other hand, is addressed to that province of the Court which is called its ancillary jurisdiction.

I Foster Fed. Pr. Sec. 51.

Milwaukee etc. R. Co. v. St. Paul Co., 2 Wall. 609; 17 Law Ed. 886.

Peoples' Bank v. Calhoun, 102 U. S. 256; 26 Law Ed. 101.

Krippendorf v. Hyde, 110 U. S. 276; 28 Law Ed. 145.

Pacific R. Co. v. Missouri etc. R. Co., 111 U. S 505; 28 Law Ed. 498.

Williams v. Morgan, 111 U. S. 684; 28 Law Ed. 559.

Johnson v. Christian, 125 U. S. 642; 31 Law Ed. 820.

Carey v. Houston etc. R. Co. 161 U. S. 115; 40 Law Ed. 638.

JURISDICTIONAL EFFECT OF SUPPLEMENTAL ERRORS

Where this court has jurisdiction it has jurisdiction to decide every question in the case, but those questions must be juridical as distinguished from administrative. If after the rendition of the judgment which is in review it should appear upon proceedings below upon the judgment that the judgment was pregnant with error in contravention of the Constitution of the United States and that those errors, whether developed by the administrative function of execution, or continuing dormant and a menace, were capable of being reduced to juridical issues in an subsequent cause of action upon the judgment which subsequent suit, distinctively and beyond question would make a case arising under the Constitution of the

United States, and of which this Court clearly would have jurisdiction on a writ of error, could there be any doubt, in those circumstance, that this court on certiorari or writ of error, would supplement its jurisdiction in the first instance and without delay and that this court would avoid putting upon the parties the burden of subsequent suits and their prosecution through the Supreme Court of the state and thence here by writ of error for the mere sake that justice should be ritualistic, rather than speedy and complete. Such subsequent proceedings have, it is true been resorted to in other causes and they are effective but they are not proof of any exclusive remedy on the erroneous judgment.

Rose v. Himely, 4 Cranch 241; 2 Law Ed. 608.

Jecker v. Montgomery, 13 How. 498; 14 Law Ed. 240.

Florida v. Georgia, 17 How. 478; 15 Law Ed. 181.

White v. Hart, 13 Wall 646; 20 Law Ed. 685.

Windsor v. McVeigh, 93 U. S. 274; 23 Law Ed. 914.

Pennoyer v. Neff, 95 U. S. 714; 24 Law Ed. 565.

Hanley v. Donoghue, 116 U. S. 1; 29 Law Ed. 535.

Scott v. McNeal, 154 U. S. 34; 38 Law Ed. 896.

New Orleans Water Works v. New Orleans, 164 U. S. 471; 41 Law Ed. 518.

Hovey v. Elliot, 167 U. S. 409; 42 Law Ed. 215.

Bell v. Bell, 181 U. S. 175; 45 Law Ed. 804.

It is not collateral attack to say of a former judgment that it was rendered in denial of due process of law, if rendered without jurisdiction in the court or without notice to the party or beyond the issues.

Old Wayne Mut. L. Assn. v. Mc Donough, 204 U. S. 8; 51 Law Ed. 345.

Hovey v. Elliott, 167 U. S. 409; 42 Law Ed. 215.

Wetmore v. Karrick, 205 U. S. 141; 51 Law Ed. 745.

Roller v. Holly, 176 U. S. 398; 44 Law Ed. 520.

Londoner v. Denver, 210 U. S. 373; 52 Law Ed. 1103.

Pennoyer v. Neff, 95 U. S. 714; 24 Law Ed. 565.

Reynolds v. Stockton, 140 U. S. 254; 35 Law Ed. 464.

Is not this case the direct antithesis of Pennoyer v. Neff, 95 U. S. 723; 24 Law Ed. 569 and within the meaning of the rule in that case. In Pennoyer's case a personal judgment against him was taken in a case *in rem*. Here a judgment is

taken *in rem*, in a case where the service was personal and was made on a party who was averred to be without any interest in the *res* of the litigation. If the personal judgment against Pennoyer was void in the proceeding *in rem* then is not the judgment *in rem* void here where the service was personal and made to answer an issue entered that the defendant sued had no interest in that which she was summoned to defend, the judgment thereafter rendered sustaining in fact the averments of the complaint that she had no interest in the *res*.

In Reynolds v. Stockton *supra* the Court of New Work had in effect said to Joel Parker; "Because you have an attorney who is exposed to the commands of this court we may impose a judgment on you which is beyond the issues stated in the pleadings."

In Hovey v. Elliott, *supra*, the Court of Appeals of New York held that the District Court of the District of Columbia proceed without right after it said to McDonald and White "You are in contempt and, therefore, you are not competent to raise any issue in the cause in which you have been sued."

So, in all the cases cited *supra*, the primary court had rendered a judgment in denial of the right to be heard, either by transcending the jurisdiction over the person of the defendant or over the subject matter of the action, or over the issues entered by the pleadings, or by imposing conditions upon the right to be heard which were in contravention of the fundamental law.

So in this case the Trustee and its creditor the Trust Company as a banker conspired together to say to Mrs. Rooker "You shall not be heard in this suit we have brought because heretofore you have parted with your interest."

Clearly if Mrs. Rooker had no interest in the trust estate she was not competent to defend it, the trust estate was without its day in court upon the issue entered by its trustee and another as joint plaintiffs with Mrs. Rooker as nominal defendant. So, if Mrs. Rooker, had in fact an interest in the trust estate, the action of the trial court in denying her competency to defend that interest, took her property without due course of law and in denial of the equal protection of the laws, provided only she had, in fact and in law an interest in the estate where her interest was thus denied a hearing. Thereupon

the question arises; May Mrs. Rooker present the federal right by certiorari upon this record or shall she, for the sake of mere ritualism, be required to go back to *nisi prius* and assert her federal right *de novo* in a second action.

The writ of certiorari is a writ of justice rather than of ritualism.

ERROR OR CERTIORARI

An examination of the cases seems to make the distinction between error and certiorari, somewhat one of the tenses.

In respect of error the cases seem to hold that the federal question must have been raised upon the record in the court of first instance. This would imply that the past tense was controlling viz; Did this or that occur upon the record; Was this or that done upon the record.

If this interpretation of the rule be true, then it would seem, the function of the writ of error should be correct in this court those federal errors of the court of first instance which should have been corrected but were not corrected in the State Court of Appellate jurisdiction. In that event the solution affected was one of the past tense.

Philadelphia & R. C. and I. Co. v. Gilbert, 245 U. S. 162; 62 Law Ed. 221.

Bruce v. Tobin, 245 U. S. 18; 62 Law Ed. 123.

Dana v. Dana, 250 U. S. 220; 63 Law Ed. 947.

Certiorari, of course, contemplates that there shall be a federal question involved but it may arise upon the record at any stage of the proceedings and it does not seem to be required that the federal question should have been expressly set up and claimed in the court of first instance. It seems to be sufficient if the claim of a federal question is made first in this court, although the presence of the question must be provable with the record as presented. Thus, suppose, the Supreme Court of Indiana had said in this case "The appellants here contend that the counter claim of the appellees was unlawful but we shall not look into that contention because we are convinced that if we did so we would be required to reverse this judgment and to reverse this judgment would withhold from the appellees certain money which they claim to have expended and it would absolve the appellants from the pay-

ment of certain sums which they claim are unlawful charges against the trust estate. We shall not withhold from the Trust Company that which it has claimed and we shall not consider the contentions of the appellants if to do so would disturb the claims of the Trust Company, though they may be wrongful and unlawful."

Would such a statement appearing in the opinion and judgment of the State Court of final appellate jurisdiction present upon the record the federal questions? (1) of denial of the equal protection of the laws and (2) would it affect the taking of property without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States? And if such a record as the one supposed were presented to this court should not this court say "It is claimed" etc; or "it is now claimed" etc; or "it is here claimed" etc. In other words would not the present tense control the situation as affecting the time when the federal question arose upon the record? This court seems to have answered these questions with the case of Saunders v. Shaw, 244 U. S. 317; 61 Law Ed. 1163.

An impelling influence must be given to these facts viz:

1. That there are the two forms of procedure, viz (1) Writ of error and (2) writ of Certiorari and

2. That there is an essential difference between the two writs which forbids the one to perform the functions of the other.

Where we know that the writ of error applies to the review of federal questions expressly set up in the court of first instance then is not it a fair inference that the writ of certiorari may be invoked to review federal questions apparent upon the record but not expressly set up in the court of first instance.

Suppose the relationship between a trustee and his banker were such that the trustee should say to his banker; "It will be safer for the interests of both of us if I join you in prosecuting your claim to judgment against the trust estate. Therefore we will select for defendant some person who has no right to defend the trust estate and we will take judgment against the trust estate without the determination of any issue which might challenge the validity of your claim?"

If an arrangement were made on that basis to establish the bankers claim, it would be a conspiracy to defraud the trust estate, would it not? And if a judgment were rendered in consummation of such a conspiracy, that judgment would be void, would it not upon the proper complaint of a real party in interest?

If the person nominated to defend such an action had no interest in the trust estate, then would not the fact be patent that the trust estate neve had been given its day in court against the claim on which its property was to be taken?

This court has held that the right to take property without due process of law or in denial of the equal protection of the law was never foreclosed against proper inquiry, or in other words that the false judgment could afford itself no immunity to impeachment.

Where it appears upon the record in a primary action that an action *de novo* could be brought thereafter upon a Federal right which would *in limine* become the basis of a writ of error out of this court to review the judgment in the action *de novo*, in such case the record in the primary action may be brought here on certiorari in the first instance without relegating the partes to a second action where might be laid a Federal right, to become the basis of a writ of error. Such primary actions often have been the basis of an action *de novo* in which the federal right was asserted which became the basis of the writ of error in the second suit.

Windsor v. McVeigh, 93 U. S. 277; 23 Law Ed. 916.

See McVeigh v. U. S. 11 Wall 267; 20 Law Ed. 81.

Pennoyer v. Neff, 95 U. S. 714; 24 Law Ed. 565.

Reynolds v. Stockton, 140 U. S. 254, 266; 35 Law Ed. 464, 468.

Hovey v. Elliot, 167 U. S. 409; 42 Law Ed. 215.

In the McVeigh Cases *supra* the taking of property without due process and the denial of the equal protection of the laws occurred when the State Court in the primary court said, in effect, to McVeigh; "You are not competent to raise any question in this case because you are a rebel."

In Pennoyer v. Neff *supra* the taking of property without due process and in denial of the equal protection of the laws occurred when State Court in the primary case said, in effect, to Neff: "Your right to defend shall be confined to the property

attached but the courts power over you may extend beyond the proceeding *in rem* and it may award a judgment *in personam* against you. In so far as the judgment *in personam* exceeded the jurisdiction *in rem* the judgment of the State Court contravened the 14th Amendment. Certiorari will permit a review of such cases here without exposing the party aggrieved to the burden of a second suit in which he may set up his federal right in such manner as to guarantee him a writ of error.

The joint counter claim herein of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, is itself a repudiation of the trust agreement and is a wrong which is forthwith actionable.

Union Pacific R. Co. v. Durant, 95 U. S. 567; 24 Law Ed. 391.
Spiedel v. Henrici, 120 U. S. 377; 30 Law Ed. 718.

There cannot be a trustee without a *cestui que trust.* Mr. Justice Miller speaking to this point said for this Court; "If the United States is a trustee there must be *cestui que trust.* There cannot be the one without the other, and the trustee cannot be a trustee for himself alone. If the legal right and the use is in the same party and there are no ulterior trusts, it ceases to be a trust."

United States v. Union Pac. R. Co., 98 U. S. 569; 25 Law Ed. 143.

The refusal by the Supreme Court of Indiana to consider the illegality of the joint counter claim of the respondents and defendants in error was clearly a denial of the equal protection of the law to the plaintiffs in error and a taking of their property without due process of law and all this was exemplified in the subsequent action of the Hamilton Circuit Court in making the lease to West. This court addressed an opinion to the subject in the Sinking Fraud Cases where the Chief Justice speaking for the Court said: "It is not only their right, but their duty as sovereign to see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others."

Sinking Fraud Cases, 99 U. S. 700, 725; 25 Law Ed. 496, 503.
Close v. Glenwood Cemetery, 107 U. S. 466; 27 Law Ed. 408.
Tennessee Bond Cases, 114 U. S. 663; 29 Law Ed. 281.

United States v. Central Pac. R. Co , 118 U. S. 235; 30 Law Ed. 173.

The judgment in this suit before maturity of the claim sued on brings this case clearly within the prohibition of law.

United States v. Union Pac. R Co., 98 U. S. 569; 25 Law Ed. 143.

Union Pac. R. Co. v. United States, 99 U. S. 700; 724; 25 Law Ed. 496.

CONCLUSION

The Federal Questions in this case may be separated readily into three classes and stated according to the effect of certain legal principles with which each class is pregnant, to-wit:

1. The claim of a Federal right which was specially set up and pleaded. That Federal right was the right of Dora E. Rooker and William V. Rooker to transfer their cause to this Honorable Court from the Supreme Court of Indiana in the true, form and manner prescribed by the Act of Congress.

2. The transfer of jurisdiction of the cause to this Honorable Court, with procedure prescribed by law, so that the authority of this Court became complete and exclusive for all juridical purposes, regardless of whether the *supersedeas* had become effective or had not become effective. This class of questions depends upon the distinctions which exist in the powers of a court as those powers may be classed (1) judicial and (2) administrative. For judicial purposes there may be an appeal —the word appeal is used here in its generic sense to include all methods of appellate review—to this court without *supersedeas*. Where an appeal is perfected without *supersedeas* bond the authority of this court for all juridical purposes becomes complete and exclusive. Pending the appeal here no other court will be permitted to exercise any juridical power affecting the cause, and if such contrary power be assumed by the court below its exercises will be void and of no effect.

3. The transfer of jurisdiction by appeal with suspension of execution on *supersedeas*: In this class all the powers of the lower court, (1) juridical and (2) administrative, are suspended and any attempt below to exercise either class of powers will be void and of no effect.

In consideration of the premises your petitioners pray the judgment of this Honorable Court that the supplemental writs, or either of them, be issued upon the terms stated in the respective applications for the original writs and that said record below be produced here for examination and adjudication and that the judgment of the Supreme Court of Indiana be in all things reversed with such directions as that justice may be done, and that the several orders of the Hamilton Circuit Court be set aside and held for naught and that the status be restored pending these proceedings. And your petitioners pray for all proper relief.

William Velpeau Rooker,
Attorney for Petitioners.

Floyd G. Christian,
Ralph H. Waltz,
of Counsel.

FILED
JUN 5 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

LAW NO. 285 OCTOBER TERM 1921

ERROR TO THE SUPREME COURT OF INDIANA

PETITIONERS SUGGESTION OF DIMINUTION OF THE RECORD AND PETITION FOR CERTIORARI UNDER RULE 14 TO CORRECT SAME IN AID OF THE WRIT OF ERROR HEREIN.

DORA E. ROOKER — WILLIAM V. ROOKER

Petitioners

VS.

FIDELITY TRUST CO., in its Corporate Capacity Proper — FIDELITY TRUST CO., as trustee of the Estate of Dora E. Rooker

Respondents

FLOYD G. CHRISTIAN,
RALPH H. WALTZ,
of Counsel.

WILLIAM VELPEAU ROOKER
Attorney for Petitioners

LEVEY, IND'PLS.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

LAW NO. 785 OCTOBER TERM 1921

ERROR TO THE SUPREME COURT OF INDIANA

DORA E. ROOKER,
WILLIAM V. ROOKER,
Petitioners
vs.
FIDELITY TRUST COMPANY IN ITS CORPORATE CAPACITY PROPER, FIDELITY TRUST COMPANY AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER
Respondents

PETITIONERS SUGGESTION OF DIMINUTION OF THE RECORD AND PETITION FOR CERTIORARI UNDER RULE 14 TO CORRECT SAME IN AID OF THE WRIT OF ERROR HEREIN.

I

The petitioners Dora E. Rooker and William V. Rooker suggest to this Honorable Court that there is diminution of the record herein pending on writ of error to the Supreme Court

of Indiana, for which a writ of Certiorari should issue to the Hamilton Circuit Court of Indiana to bring up the record of that Court in aid of the Writ of Error in this cause.

II

That said deficiencies consist in the exemplification of the affected judgment, by the respondents herein with the aid of the Supreme Court of Indiana and the Hamilton Circuit Court of Indiana, to the effect that:

(1.) Upon the record herein these petitioners were not, nor was either of them, entitled to be heard and to have their day in Court, for the reason that in and by their deeds of trust in the premises they had parted with all their right, title and interest in and to the affected premises by outright sale to and outright purchase by the Fidelity Trust Company as trustee with no condition except as to price and terms of payment.

(2.) Upon the record herein the Trust Estate of said Dora E. Rooker never had its day in Court for the reason that Dora E. Rooker was incompetent, as being without interest, to defend said trust estate and there was no crossbill as between said Fidelity Trust Company in its corporate capacity proper, pretending to be the banker and creditor of its co-respondent, and said co-respondent trustee of the estate of Dora E. Rooker, which tendered any issue as to any claim or demand of said respondent as banker and creditor against said trustee affecting said trust estate.

(3.) Upon the record made by said respondents and said State Courts in this cause it is apparent, and conclusive that the theory and purpose of the action of the respondents in the premises, was to deny said trust estate its day in Court and that this was done, and that said trust estate was denied its day in Court to defend against the claim jointly asserted by and reduced to judgment in favor of said respondents.

(4.) Upon the record made by said respondents and said State Courts in this cause it is apparent and conclusive that said trust estate was denied the equal protection of the laws and its property was taken without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

(5.) Upon the record made by said respondents and said State Courts in this cause, in the premises it is nevertheless apparent and conclusive that these petitioners Dora E. Rooker and William V. Rooker were the *cestuis que trust* of said estate and were the equitable owners thereof and that by the wrongful acts of said respondents and said State Courts these petitioners were denied the equal protection of the laws and their property was taken without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

(6.) That said acts in the premises of said respondents and of said State Courts are to the effect of admissions upon the record that said trust estate was denied the equal protection of the laws and its property taken without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(7.) That said acts in the premises of said respondents and of said State Courts are to the effect of admissions upon the record that said petitioners Dora E. Rooker and William V. Rooker, as said *cestuis que trust* were denied the equal protection of the law and that their property was taken without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(8.) That this Honorable Court is entitled to the presence of said admissions as (1) and estopped against said respondents and (2) for their probative effect in the lawful determination of this cause to the end that justice may be done and that said *cestuis* may be permitted to redeem said trust estate from said malevolent trustee upon the terms and conditions stated in the prayer for relief recited and set forth in their complaint herein.

(9.) That a transcript of said record in said Hamilton Circuit Court is lodged in the office of the Clerk of the Honorable Court and printed copies thereof have been made and lodged in the office of said Clerk and may the same be used for reference and for greater certainty?

III

Petitioners say that said diminution of the record, presenting as it does present the said matters aforesaid, arises upon the

record and is apparent in the manner and particulars following, to-wit:

(1.) Said Hamilton Circuit Court erred in its ruling, order and judgment of March 7, 1922, in overruling the motion of the said Dora E. Rooker and William V. Rooker to set aside and vacate the order and judgment of said Hamilton Circuit Court, and the proceedings had thereon, made and entered on to-wit: the 27th day of February, 1922, which motion was to the effect following:

(a.) That said order and judgment and proceedings had thereon were wholly void for the reason that the same were made, entered and taken without any notice whatever to said Dora E. Rooker and William V. Rooker, or either of them, and wholly without their information and without the information of either of them.

(b.) That the jurisdiction of the parties to the subject matter of the proceedings stated in said motion was, and for many weeks continuously last past had been, exclusively in the Supreme Court of the United States, as must be and was apparent upon the facts in the premises, to-wit: The real estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker, as plaintiffs, and the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at one time, but not since the year 1919, pending in said Hamilton Circuit Court as Cause No. 16,338; that on to-wit: the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in said Hamilton Circuit Court in said cause; that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that on, to-wit: the 22nd day of June, 1921, the Supreme Court of Indiana affirmed said judgment of said Hamilton Circuit Court and thereafter, on the 12th day of October, 1921, said

Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on, to-wit: the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States and to the Justices thereof for a Writ of Error to the Supreme Court of Indiana in said cause and for a Writ of Certiorari to be directed to the Supreme Court of Indiana by the Supreme Court of the United States in said cause; afterwards, on to-wit: the 5th day of December, 1921 the said Dora E. Rooker and William V. Rooker lodged in the office of the Clerk of the Supreme Court of the United States their transcript of said record, proceedings and judgment and at the same time the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a Writ of Certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana, and said petition was duly docketed as cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money, all as required by the rules and practice of the Supreme Court of the United States; that afterwards on, to-wit: the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States in said cause was issued on petition therefor of the said Dora E. Rooker and William V. Rooker, and at the same time said Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for the payment of all damages and costs, which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker filed their citation and proof of service thereof in the office of the Clerk of the Supreme Court of Indiana; that on December 19, 1921, the said Dora E. Rooker and William V. Rooker lodged in said Clerk's office a copy of said Writ of Error in said cause for said Fidelity Trust Com-

pany in its corporate capacity proper and said Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that on December 22, 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court in said cause on said Writ of Error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and was pending as Cause No. 785, October Term, 1921, in the Supreme Court of the United States at the time when said proceedings were had, as herein complained of, in said Hamilton Circuit Court of Indiana in said cause.

(c.) That said order and judgment of February 27, 1921, of the Hamilton Circuit Court of Indiana and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatever to the said Dora E. Rooker and William V. Rooker, or either of them, and without their having any knowledge whatsoever that the petition upon which said order and judgment were founded was filed and pending and being heard and determined in said Hamilton Circuit Court.

(d.) That said order and judgment and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said Hamilton Circuit Court in which said order and judgment and the proceedings had thereon were taken, was wholly without jurisdiction of the parties and the subject matter of said petition for the reasons heretofore stated in recital of the steps taken to lodge and vest the jurisdiction of said parties and of said subject matter in the Supreme Court of the United States.

IV

(a.) The Hamilton Circuit Court of Indiana erred in taking

and exercising jurisdiction of the petition filed on the 27th day of February, 1922, said petition being to the effect following:

The Fidelity Trust Company, Trustee, represented to the court that said Trustee since the affirmance by the Supreme Court of Indiana of the decree of said Hamilton Circuit Court directing said Trustee to sell the lands and tenements in Hamilton County, Indiana, belonging to and constituting a part of the trust estate of Dora E. Rooker, had made effort to sell said land and tenements but had not been able to do so and would not be able to do so before the beginning of the crop year on March 1, 1922, for the reason that the plaintiffs, Dora E. Rooker and William V. Rooker, were now attempting to perfect an appeal of said cause from the Supreme Court of Indiana to the Supreme Court of the United States; that unless said Hamilton County lands of said trust estate were rented and farmed for the crop year 1922 it would cause loss and waste to said trust estate and that, therefore, said trustee had tentatively leased said lands to one Thomas West for said year on a basis of grain rent, which lease said trustee then and there tendered the court and asked that the same be approved by the court and ordered delivered.

(b.) The Hamilton Circuit Court erred in sustaining the petition of the Fidelity Trust Company, Trustee, approving the lease of lands of said trust estate in said Hamilton County and in ordering said lease to be delivered and in placing said Thomas West in possession of said lands; that said order and judgment of said Hamilton Circuit Court takes the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(c.) The Hamilton Circuit Court of Indiana erred in disregarding and denying the additional answer of Dora E. Rooker and William V. Rooker to the petition of the Fidelity Trust Company as Trustee for a Writ of Assistance, which additional answer was filed in said Court on the 10th day of January, 1922, and was to the effect following, to-wit: That the said Dora E. Rooker and William V. Rooker made their plea by said answer to the jurisdiction of said Hamilton Circuit Court

in the matter of the petition of the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker for a Writ of Assistance, the said plea of Dora E. Rooker and William V. Rooker to the jurisdiction of said Hamilton Circuit Court in the premises being to the effect following: to-wit: That said Hamilton Circuit Court should proceed no further in the premises for the reason that the jurisdiction of the subject matter of the cause and the parties thereto was exclusively in the Supreme Court of the United States upon the facts following, to-wit: On the 12th day of October, 1921, this cause was pending in the Supreme Court of Indiana on appeal from the judgment of said Hamilton Circuit Court and on said day said Supreme Court overruled a petition for rehearing; on the 14th day of December, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana, their petition for a Writ of Error to the Supreme Court of the United States in said cause and they filed at the same time and in the same place their Assignment of Errors; that thereupon said petition for a Writ of Error was presented to the Chief Justice of the Supreme Court of Indiana, who allowed the same and fixed the appeal bond at the penal sum of One Thousand Dollars, conditioned as provided by law for the payment of all damages and costs and approved the New Amsterdam Casualty Company of New York as surety on the bond; that thereupon said bond so fixed and conditioned was approved by the Chief Justice of the Supreme Court of Indiana and filed in said cause in the office of the Clerk of said Supreme Court; that on the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States issued in the name of the President, bearing teste of Noble C. Butler, Clerk of the District Court of the United States for the District of Indiana and the seal of said court, was filed by the said Dora E. Rooker and William V. Rooker in said cause in the office of the Clerk of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker as appellants in said cause to the Supreme Court of Indiana and as plaintiffs in error in said cause in the Supreme Court of the United States, filed in the office of the Clerk of the Supreme Court of Indiana their citation to the Fidelity Trust Company in its

corporate capacity proper and the Fidelty Trust Company as Trustee of the estate of the said Dora E. Rooker, commanding their presence as required by law in said cause in the Supreme Court of the United States and together with said citation said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana the acknowledgment of service of said citation on said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as said Trustee; that on the 19th day of December, 1921, said Dora E. Rooker and William V. Rooker as said appellants in the Supreme Court of Indiana, and the said plaintiffs in error in said cause in the Supreme Court of the United States lodged for said defendants in error a copy of said writ of error in the office of the Clerk of the Supreme Court of Indiana; that on the 22nd day of December, 1921, said Dora E. Rooker and William V. Rooker filed their praecipe in the office of the Clerk of the Supreme Court of Indiana for a transcript of the record, proceedings and judgment of the Supreme Court of Indiana in said cause and with said praecipe they filed the acknowledgment of service thereof on said defendants in error; that said Dora E. Rooker and William V. Rooker upon information and belief stated that the Clerk of the Supreme Court of Indiana had at that time practically completed said transcript and had informed them that he would have said transcript in the office of the Clerk of the Supreme Court of the United States all within the time and manner provided by law.

V

That the Hamilton Circuit Court erred in accepting and retaining jurisdiction of a certain petition filed on the 16th day of November, 1921, in said cause by the Fidelity Trust Company as Trustee for an attachment for contempt against Dora E. Rooker and William V. Rooker and for a Writ of Assistance to put said Fidelity Trust Company in possession of lands of the trust estate in said Hamilton County which said motion for attachment and petition for Writ of Assistance were in substance as follows, to-wit:

"The Fidelity Trust Company, Trustee, defendant and cross-complainant in the above entitled cause, respectfully shows to

the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiff's complaint and upon defendant's counterclaim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counterclaim and cross-complaint; that this court on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee, then held the legal title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

"All of the West half of the north half of section eighteen (18), township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad containing ninety-two (92) acres, more or less.

"Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

"Also the southeast quarter of section twelve (12) township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

"Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty two rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 29.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place

of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County Indiana.

"And the southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north of range four (4) east, containing forty (40) acres, more or less, situated in Marion County, Indiana.

"It was in said judgment and decree further adjudged and decreed that this defendant was then and there entitled on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

"It was further in said judgment and decree adjudged and decreed that said plaintiffs had then parted with all their title to said real estate, and the appurtenances thereunto belonging and the right to the possession thereof, and the use, rents and profits thereof, and that they then had no interest therein other than an interest in the proceeds of the sale of said real estate contingent wholly upon a sale thereof at such a price that, after the payments of costs, liens, said judgment on account for $50,697, and the further reimbursement of said defendant trustee of such sum or sums as might accrue to it in the execution of said trust an unappropriated sum might still remain in defendant's hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and obstructive of the completion of the execution of said trust by said defendant and that said plaintiffs were then and thereby each and both perpetually enjoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give possession and from in any manner interfering with, disputing, or obstructing said trustee,

or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands.

"It is further in said judgment and decree ordered and adjudged and decreed that said defendant, trustee, should proceed under the terms of the deeds and trust agreement under which it held title, to sell said lands and to proceed and first make sale of said Marion County lands and later to make sale of said Hamilton County lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or disapproval.

"Said judgment and decree further directed the application of the proceeds of such sales.

"And further defendant avers that at the conclusion of the hearing and trial of said cause and before the finding and judgment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered by the agreement of the parties to said action, plaintiffs and defendants, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton county lands, collect the proceeds and apply and distribute the same under the direction of the court; that said trust company did appear in open court on said day and did accept said trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from said trust.

"And defendant further avers that said defendants filed in the Supreme Court of Indiana a vacation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issued to stay execution on said judgment and that the same has been and remained in full force and effect and is now, and that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and thereafter plaintiffs filed a petition for a rehearing thereof which was on October 12, 1921, in all things overruled, and said judgment became absolutely final.

"And plaintiff avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure

a purchaser and to sell said Marion County real estate; that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court as that such objections and exceptions were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay of proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained, and is now in full force and effect; that defendant did, pursuant to said order execute its deed by delivering the same to said Triangle Realty Company and received the consideration of said sale, to-wit, the sum of $16,000.

"And defendant further avers that notwithstanding the aforesaid judgment and decree of December 21, 1918, said plaintiffs Dora E. Rooker and William V. Rooker, have at all times since claimed to be the owners of the said real estate and entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendants; that without right and without the knowledge of this defendant and without the knowledge or approval of the court said plaintiff procured said Wainwright Trust Company receiver as aforesaid, to make leases to one West for the crop years 1919 and 1920, of the tillable parts of said Hamilton County lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amount and value of which are at this time unknown to the defendant, and did deliver one-half thereof to said Dora E. Rooker and William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that said plaintiff unlawfully and in violation of the decree of this court converted said crops to their own use; that in the year 1920 said plaintiff

without the knowledge of defendant or this court took the rental of said Hamilton County lands out of the hands of the court's receiver, said Wainwright Trust Company, and themselves rented the same to one Thomas West for a grain rent for the crop year 1921 providing therein that he should deliver the landlord's share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one-half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921 produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlord's share thereof fifty tons of the value of $600.00, which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3,000 bushels of corn of the net value of $1,000 of which plaintiffs are claiming one-half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threatening said West with legal action if he does not comply with such demand and are seeking by threats and intimidation to prevent him from gathering his share of said corn if he does not so comply.

"And defendant further avers that at the time of the sale of said Marion County land in 1919 as aforesaid there was then on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs; that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlord's share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it all of which said tenant was then and there informed by defendant; that said plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's

share of said crops and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant and to hold possession thereof as such and to deliver to them the landlord's share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of 1921, continue to do so; that in the years 1919, 1920 and 1921, said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time, and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of 1921, said purchaser received possession of said lands and put its own tenant in possession thereof, thereupon on the day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant, was a trespasser on said premises and that he, Rooker, was the owner thereof with the right to the possession and use thereof.

"And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held possession of the dwellings and other appurtenances of said Hamilton County lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against said lands, including taxes, insurance, etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiffs' conduct and the depreciation of said property it can not now be sold at a price which

will pay the costs and expenses and reimburse it fully for its outlay and interest.

"And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton County lands and appurtenances which demand was refused by them and they and each of them refuses to comply therewith.

"And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn into the case, or involved in it or decided either by the Circuit Court of Hamilton County or the Supreme Court of Indiana; that said proposed appeal is for the sole purpose of attempting to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

"And defendant avers that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

"Wherefore defendant prays the court that said cause be redocketed and that this court's former judgment and decree may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurtenances and by putting defendant into possession thereof; and that a Writ of Assistance be awarded to defendant to put it in possession of said land and appurtenances and to oust said plaintiffs their agents, servants and all acting for and claiming under them, and defendant prays for all proper relief in the premises which a court of equity may accord."

VI

The Hamilton Circuit Court of Indiana erred in sustaining the demurrer of the Fidelity Trust Company as Trustee to the plea in abatement of Dora E. Rooker and William V. Rooker filed in said court under their special appearance to

the petition for Writ of Assistance, etc. which plea in abatement was in substance, as follows:

"Dora E. Rooker and William V. Rooker, hereby enter their special appearance to the 'Petition for Writ of Assistance, etc.' filed herein by the Fidelity Trust Company, Trustee, on the 16th day of November, 1921, for the sole purpose of pleading to the jurisdiction of this court over the subject matter of said petition and over the persons of these respondents to said petition and for cause these respondents say:

"1. That these respondents claim the right and privilege to take this cause direct from the Supreme Court of Indiana to the Supreme Court of the United States for review upon Writ of Error and upon Writ of Certiorari, or either of said writs, because of certain questions arising upon the decision and judgment of the Supreme Court of Indiana involving the rights of these respondents under the constitution and laws of the United States, to-wit:

"A. That the Indiana Practice Act of March 15, 1913, as amended and approved March 5, 1915, entitled 'An Act Concerning Proceedings in Civil and Criminal Cases' impairs the obligation of contracts, and of the contract involved in this suit in contravention of Article One of the Constitution of the United States.

"B. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

"C. That the decision and judgment of the Supreme Court of Indiana in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

"D. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause takes the property of these respondents without due process of law in contravention of the 14thAmendment of the Constitution of the United States.

"E. That the decision and judgment of the Supreme Court of Indiana takes the property of these respondents without

due process of law in contravention of the 14th Amendment of the Constitution of the United States.

"2. That these respondents claim their right and privilege to take said cause directly to the Supreme Court of the United States without the intervention of this court pursuant of the judicial code as amended.

"3. That heretofore on the 10th day of November, 1921, these respondents filed in the office of the Clerk of the Supreme Court of Indiana their praecipe in writing for a transcript of the record, proceedings and judgment of said Supreme Court presenting as it does present, the said Federal questions involved therein, as hereinbefore stated; that prior to the filing of said praecipe these respondents paid to the said Clerk an estimate of the cost of said record; that said Clerk of the Supreme Court of Indiana informs these respondents, and upon such information they state the fact to be, that said transcript will be completed and ready for delivery to them within the next ten days.

"4. That these respondents have written a brief for the purpose of presenting their petition to said Supreme Court of the United States and to the Justices thereof, for a Writ of Certiorari and a Writ of Error, or either of said writs; that at the present time more than two hundred pages of said brief are printed and said brief is ready for completion when respondents obtain the transcript of said record from the Clerk of the Supreme Court of Indiana, so that from said transcript, these respondents may insert in said brief the proper page references to contents of said transcript.

"5. That these respondents are pursuing with due diligence their effort to take said cause for review, as aforesaid, to the Supreme Court of the United States; that it is their purpose to effect and accomplish their said endeavors and present said cause, as aforesaid, to the Supreme Court of the United States within the time required therefor by the laws of the United States.

"6. That prior to the filing of this petition in this cause, these respondents orally informed said Fidelity Trust Company and its attorneys that this cause was to be presented for review as aforesaid to the Supreme Court of the United States; that thereafter and prior to the filing of this petition for a Writ

of Assistance, as these respondents are informed and believe, and upon information and belief, they state the fact to be, that Charles E. Cox, one of the attorneys of the Fidelity Trust Company in this cause, went to the office of the Clerk of the Supreme Court of Indiana and made an examination of the record and made notation of the entries in this cause and of the said praecipe of these respondents for this record.

"WHEREFORE, these respondents say that this court is without jurisdiction in the premises and they demand judgment that this proceeding abate and they pray for all proper relief."

VII

The Hamilton Circuit Court erred in overruling the demurrer of Dora E. Rooker and William V. Rooker to the petition for a Writ of Assistance, as amended, of the Fidelity Trust Company, as Trustee of the estate of Dora E. Rooker, said demurrer being upon the grounds, to-wit:

"That there is a defect of parties plaintiff in said petition in this, to-wit: That upon the proceedings and judgment recited in said petition and the record of this court pertaining thereto, it is apparent that said judgment is the joint judgment of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company, in its corporate capacity proper, is not a co-petitioner nor is it made a defendant to answer thereto nor in any wise required to assert its interest in the premises, nor is there any showing in said petition that said interest of the Fidelity Trust Company in its corporate capacity proper has been transferred to and is held by the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company in its corporate capacity proper should be joined as a co-petitioner in said petition or it should be named as a defendant thereto and the reasons shown why said Fidelity Trust Company in its corporate capacity proper fails to join in said petition.

"2. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit:

That it is named in said petition that the Wainwright Trust Company is receiver of the lands in controversy situate in Hamilton County in the State of Indiana; that said receiver is a necessary and proper party to these proceedings and said petition should require the Wainwright Trust Company to appear and answer as to its interest in the premises.

"3. That there is a defect of the parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that Thomas West is tenant of the lands in controversy situate in Hamilton County in the State of Indiana; that said tenant is a necessary and proper party to these proceedings and said petition should require the said Thomas West to appear and answer as to his interests in the premises.

"5. That said petition does not state facts sufficient to constitute a cause of action as a petition for a writ of assistance.

"6. That said petition as amended is not verified.

MEMORANDUM

"For their memorandum with their demurrer in respect of the insufficiency of said petition to state a cause of action these plaintiffs say:

"1. That the judgment sued on is a joint judgment and can not be enforced singly.

"2. That the Fidelity Trust Company, Trustee, is not the real party in interest.

"3. That it is not shown that the Fidelity Trust Company in its corporate capacity proper withholds its consent from this proceedings.

"4. That the Writ of Assistance is not a primary writ but is issued only in aid of a prior process of court and that no such process has been issued out of this court on this judgment.

"5. That no execution ever has been issued on the judgment and decree of court mentioned in said petition."

VIII

The Hamilton Circuit Court of Indiana had no jurisdiction to enter upon the execution of the mandate of the Supreme Court of Indiana pursuant of its opinion and judgment while

the same was pending for review in the Supreme Court of the United States and the proceedings had in said Hamilton Circuit Court in the premises were *coram non judice* and void.

IX

The Hamilton Circuit Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate because by their deeds of trust they had sold and conveyed the trust estate to the Trustee in its own right and the Trustee had purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

X

The Hamilton Circuit Court of Indiana erred in accepting and applying the opinion, judgment and mandate of the Supreme Court of Indiana as meaning and directing that Dora E. Rooker and William V. Rooker could, and should, be denied their day in court to redeem and defend the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate, because by their deeds of trust they had sold and conveyed the trust estate to the Trustee in its own right and the Trustee had purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

XI

The Supreme Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem from the Trustee, and defend the trust estate, upon its repudi-

ation of the trust agreement by holding that to entertain the objections of Dora E. Rooker and William V. Rooker to the illegality of the joint counter-claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the trust estate of Dora E. Rooker would work to the harm and prejudice and financial loss of the Trustee and to the undeserved gain of the said Dora E. Rooker and William V. Rooker and by said denial said Supreme Court of Indiana took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

XII

The Hamilton Circuit Court of Indiana erred in accepting and applying the opinion, judgment and mandate of the Supreme Court of Indiana as meaning that Dora E. Rooker and William V. Rooker could, and should be denied their day in court to challenge the illegality of the joint counter-claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, because to entertain that challenge would work to the harm and prejudice of said Trustee and to the undeserved gain of said Dora E. Rooker and William V. Rooker, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

Your petitioners are advised and believe that said proceedings and each of them of the Hamilton Circuit Court in said cause are erroneous in the particulars hereinbefore enumerated, and that this Honorable Court should require said case to be certified to for its review and determination in aid of said writ of error, said proceedings in said Hamilton Circuit Court being taken under the pretended authority of the opinion, judgment and mandate of the Supreme Court of Indiana in said cause, the same being a final decision

by the highest court of Indiana competent to decide said case. A certified copy of the entire record of the Hamilton Circuit Court of Indiana in said cause under said pretended opinion, judgment and mandate is hereby furnished, attached to and made part of this application and marked Exhibit B in compliance with Rule 37 of this Honorable Court.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari may be issued out of and under the seal, of this court directed to the Hamilton Circuit Court of Indiana commanding said court to certify and send to this court on a certain day to be therein designated a full, true and complete transcript of the record and proceedings of said Hamilton Circuit Court in said cause entitled: Dora E. Rooker, William V. Rooker, Plaintiffs, vs. Fidelity Trust Company in Its Corporate Capacity Proper, Fidelity Trust Company, Trustee of the Estate of Dora E. Rooker, defendants, to the end that said cause may be reviewed and determined by this court, and that your petitioners may have such other and proper relief or remedy in the premises as this Court may deem appropriate and in conformity with the provisions of the Judicial Code and that said judgment of the Supreme Court of Indiana in said case and every part thereof may be reviewed by this Honorable Court, and that said proceedings, orders and judgments of said Hamilton Circuit Court in said case, and each part thereof, may be reviewed by this Honorable Court, and in all things reversed.

William Velpeau Rooker,
Attorney for Petitioners.

F. G. Christian
Ralph H. Waltz
of Counsel

State of Indiana }
County of Hamilton } ss

Dora E. Rooker and William V. Rooker being first duly sworn upon their oaths say that they are the petitioners in the foregoing petition; that said petition is true in substance and in fact; that as to the matters of law therein stated these

petitioners have taken the advice of counsel; that the errors of law therein complained are substantial and the claims thereof are well founded and that said errors of law are clearly to the prejudice and damage of these plaintiffs and that these petitioners are entitled to have relief from said errors which is in the petition prayed, and further affiants saith not.

Dora E. Rooker.
William V. Rooker.

Subscribed in my presence and sworn to before me, this Second day of June, 1922.

Witness my hand and official seal.

William H. Howard,
[SEAL] Notary Public.

My commission expires May 9, 1923.

The respondents in the cause above entitled are hereby notified that on the first Monday in October 1922, or as soon thereafter as counsel can be heard, the said petitioners will move to submit their petition and brief in the premises to the Supreme Court of the United States, in the Capitol at Washington, D. C., and will ask that the Writ of Certiorari of said Court be issued and directed to the Hamilton Circuit Court of Indiana, commanding and requiring the certification to the Supreme Court of the United States of all the proceedings of said Hamilton Circuit Court done on and since the 26th day of October, 1921, and in anticipation of the jurisdiction of the Supreme Court of the United States, and that justice be done.

William Velpeau Rooker
Attorney for Petitioners

Received copy of the foregoing notice, petition and brief this Second day of June, 1922.

Attorney for Respondents

EXHIBIT B
TRANSCRIPT

April 7, 1922. Received of W. V. Rooker, Attorney, Eighteen ($18.00) Dollars, cost of the transcript.

J. D. Hill, Clerk.

1 PLEAS and proceedings before the Honorable Fred E. Hines, sole judge of the Hamilton Circuit Court, the same being the 24th Judicial Circuit of the State of Indiana, at a term of said court, commenced and held at the Court House, in the City of Noblesville, on the 1st Monday in October, 1921, in the case of

Dora E. Rooker
William V. Rooker
vs.
Fidelity Trust Company
} No. 16338

BE IT REMEMBERED, That heretofore to-wit, on the 26th day of October, 1921, the Clerk of the Supreme Court, of the State of Indiana, filed in the office of the Clerk of the Hamilton Circuit Court a certified copy of the opinion and judgment of said Supreme Court, in the above entitled cause which certified copy of opinion and judgment reads as follows:

THE STATE OF INDIANA,

IN THE SUPREME COURT, MAY TERM, 1921. On the 22nd day of June, 1921, being the 27th Judicial day of said May Term, 1921.

Hon. Howard L. Townsend, Chief Justice
Hon. Louis B. Ewbank
Hon. David A. Myers — Associate
Hon. Julius C. Travis — Judges
Hon. Benjamin M. Willoughby

No. 23598
In The Case Of
Dora E. Rooker, et al.,
vs.
Fidelity Trust Company

Come the parties by their attorneys, and the court being sufficiently advised in the premises, give its opinion and judgment as follows, pronounced by Willoughby, J.

This case is a resumption of proceedings under the mandate of this court in Rooker vs. Fidelity Trust Company 185
2 Ind. 172. The appellants as settlers of a trust in lands sued appellee who was the trustee alleging a violation and repudiation of the trust and demanding damages, an accounting, that the appellee trustee be removed, and that a receiver be appointed for the trust estate to administer it under the terms of the trust agreement. Appellee on its part filed a cross-complaint in which it set up the same trust and its duties under it as trustee, its performance of all its duties save the sale of the trust estate, its reason for not making such sale, its purpose to carry out the sale and its hindrance by appellants interference and claim of title. It asked an accounting that its title as trustee be quieted, that appellants be enjoined and that it be decreed to make sale pursuant to the trust agreement and distribution of proceeds accordingly.

Appellants' complaint was answered by appellee trustee by general denial. Issue was formed on the cross-complaint of appellee trust company by answer of general denial and by special partial answers, the issues on the latter being made by replies in general denial. On these issues the cause was submitted to the court for trial, and the following special finding of facts and conclusions of law were made and stated by the court.

The court finds the facts to be: First, that on and prior to the 11th day of October, 1909, the plaintiff, Dora E. Rooker, was the owner in fee simple of certain real estate situate in Hamilton County, Indiana. Second: that on and prior to the 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entireties, of certain real

estate situated in Marion County, Indiana. Third: that on the said 11th day of October, 1909, said plaintiff, Dora E. Rooker and William V. Rooker, her husband, executed and delivered to said cross-complainant, Fidelity Trust Company, as trustee their warranty deed for the lands in Hamilton County.

TO HAVE AND TO HOLD, said real estate, how-
3 ever in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser: it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee.

And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances.

And to do any and all acts and to execute any and all papers, which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

And in the event any such liens or charge against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforceable by it and collectible with interest at the rate of

6% per annum, to be credited semi-annually as a debit and charge against said real estate.

4 THIS CONVEYANCE IS MADE subject to the taxes for the years 1908 and 1909 and subject to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of certain principal note of said grantor in the sum of Fourteen Thousand ($14,000) Dollars together with interest thereon and recorded in mortgage record 52, page 84, in the office of the Recorder of Hamilton County, Indiana.

That said Indenture by Dora E. Rooker and William V. Rooker, her husband, was received for record on the 14th day of October 1909 and recorded in record 97, at page 117, in the Recorder's office of Hamilton County, Indiana.

FOURTH: That on said 11th day of October, 1909, the plaintiff William V. Rooker and Dora E. Rooker, husband and wife, executed and delivered to said cross-complainant Fidelity Trust Company as trustee, their warranty deed for the lands in Marion County.

TO HAVE AND TO HOLD said real estate, however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee, as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell the same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made

by said Fidelity Trust Company of Indianapolis, as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said Fidelity Trust Company is directed to apply the proceeds, arising from such sale in the manner and for the purpose set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

The said Fidelity Trust Company of Indianapolis, as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of 6% per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

This conveyance is made subject to the taxes for the year 1908 and 1909 and subject also to certain mortgage executed March 12, 1909, by the grantors, William V. Rooker, and Dora E. Rooker husband and wife, to the Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of six thousand ($6,000) dollars and interest coupon notes there-

on which mortgage is recorded in mortgage record 523,
6 page 128, in the office of the Recorder of Marion County, State of Indiana.

That this Indenture was received for record on the 14th day of October, 1909, and recorded in Record 52, page 101 in the office of the Recorder of Marion County, Indiana.

FIFTH: That contemporaneously with the execution of the two warranty deeds executed on the 11th day of October, 1909, to said Fidelity Trust Company, Trustee, and as part of the same transaction the plaintiffs Dora E. Rooker and William V. Rooker, as first parties and the defendant and cross-complainant, Fidelity Trust Company of Indianapolis, Indiana, as second party, executed in duplicate on the 11th day of October, 1909, a memorandum or contract in writing. (This memorandum or contract in writing is set out in full in the opinion in Rooker vs. Fidelity Trust Company, 185 Ind. beginning page 173).

SIXTH: That since the execution of said warranty deeds and said written memorandum, the plaintiff, Dora E. Rooker, has continued in the possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the plaintiffs, William V. Rooker and Dora E. Rooker, have continued in the possession of and farmed all of the real estate situated in Marion County, Indiana, and are now in possession thereof.

SEVENTH: That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff, Dora E. Rooker, has received all of the proceeds arising out of the Hamilton County real estate and has not at any time rendered an accounting to the Fidelity Trust Company, Trustee, and the plaintiffs William V. Rooker and Dora E. Rooker have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company, Trustee.

EIGHTH: That Fidelity Trust Company, Trustee, has not sold or conveyed any of the real estate conveyed to it by plaintiffs and that the title of the same is now in the said Fidelity Trust Company, Trustee, and that said Fidelity Trust

Company is not claiming or asserting any other title than the title and right set forth in the deeds of conveyance and
7 memorandum of trust, hereinbefore set out in these findings.

NINTH: That prior to the commencement of plaintiffs' action namely on or about the 15th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company, Trustee, served a written notice upon the plaintiffs demanding the payment of certain sum aggregating Nineteen Thousand Six Hundred Dollars and Four ($19,604.04) Cents and tendered for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County lands to the original grantors upon the payment of the aforesaid sum upon demand and stating that said quit claim deed will remain in the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the demand.

TENTH: That the plaintiff, Dora E. Rooker, in the constructing of her dwelling house on the Hamilton County land contracted large liabilities to various persons, firms and corporations for work and labor done and material furnished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said Fidelity Trust Company, Trustee, under said contract and upon the security evidenced by said two separate warranty deeds and agreement of trust, all executed and delivered October 11, 1909, did from time to time thereafter upon the written order and direction of the plaintiff, Dora E. Rooker, first pay out the total sum of six Thousand ($6,000) Dollars and did further, after paying on the written order and direction of said Dora E. Rooker the total sum of Six Thousand Dollars let out and expend a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the plaintiff Dora E. Rooker issued from time to time to the defendant and cross-complainant Fidelity Trust Company, directing the payment of certain obligations showing on their face the nature of the claim, the amount thereof, and the party to whom payment should be made, and

that the signature affixed thereon is the signature of the plaintiff, Dora E. Rooker.

ELEVENTH: That said Fidelity Trust Company made payment on such written orders issued from time to time by plaintiff, Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff, Dora E. Rooker, and receipted by the respective parties in whose favor the voucher is drawn aggregating the sum of $15,813.21.

TWELFTH: The said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts aggregating the sum of $21,194.27.

THIRTEENTH: That no assets came into the possession of the Trustee other than lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Indiana, a corporation engaged in the business of operating a trust company under the laws of the state of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

FOURTEENTH: That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, Trustee, is entitled to have and receive for its compensation, a trustee's fee of one hundred and fifty ($150.00) Dollars, which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of two (2) per cent on loans and advancements and all moneys laid out and expended, of which One Hundred and Twenty ($120) Dollars has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant is further entitled to have and receive interest on all moneys loaned or advanced at the rate of six (6) per cent per annum.

FIFTEENTH: That the plaintiffs are entitled to the following credits, to-wit: Ninety-five ($95.00) Dollars, together with interest thereon at six (6) per cent from October 16, 1909, on account of the cancellation of insurance policy of Six Thou-

sand ($6,000) Dollars, said sum having been charged
9 against plaintiffs under the order and voucher dated October 16, 1909; also a credit of Five Hundred ($500) Dollars with interest at four (4) per cent from August 26, 1910, less Fifteen ($15) Dollars deducted from the principal amount as a premium upon the Surety Company bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company as collateral on a supersedeas in the case of William V. Rooker and Dora E. Rooker vs. Ludowici Caladon Company in the appellate court, which cause was affirmed on appeal and upon the judgment being paid said security of deposit returned; also a rebate of Four Hundred and Two and 81/100 Dollars ($402.81) representing the various amounts of penalties and costs including in various payments for taxes on the Marion County Lands.

SIXTEENTH: There is now due and owing to the defendant and cross-complainant herein from the plaintiffs cross-defendants herein, the principal sum of Thirty-seven Thousand and Seven and 48/100 ($37,007.48) Dollars; and for the interest thereon, the aggregate sum of Fourteen Thousand Two Hundred and Seventy-one and 29/100 ($14,271.29) Dollars; and for commission at two (2) per cent on all funds paid out in excess of Six Thousand ($6,000) Dollars the aggregate sum of Six Hundred and Twenty and 14/100 ($620.14) Dollars from which there shall be deducted the aggregate sum of Nine Hundred Eighty-two and 81/100 ($982.81) Dollars, together with interest thereon amounting to Two Hundred and Eighteen and 51/100 ($218.51) Dollars, being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein in the sum of Fifty Thousand Six Hundred and Ninety-seven and 59/100 ($50,697.59) Dollars.

SEVENTEENTH: That all the amounts advanced and paid out by the defendant Fidelity Trust Company, Trustee, as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker,

and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, Trustee, is entitled to reimburse itself therefor according to the terms of said trust agreement by the sale of said lands therein provided.

EIGHTEENTH: That on the 21st day of June, 1917, the defendant Fidelity Trust Company, as Trustee, served a notice upon William V. Rooker and Dora E. Rooker of which the following is a copy:

"TO WILLIAM V. ROOKER AND DORA E. ROOKER

"Pursuant to the provisions of the deed of conveyance executed to the undersigned as Trustee, on the 11th day of October, 1909, conveying to the undersigned as Trustee, the following described real estate in Marion County, State of Indiana, to-wit: The southeast quarter of the northeast quarter of section 33, Township 17 north, range 4 east, containing 40 acres more or less; also the southwest quarter of the northwest quarter of section 34, Township 17 north, range 4 east, containing 40 acres, more or less, and the memorandum executed concurrently therewith, notice is hereby given that the Fidelity Trust Company as Trustee will ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the purchaser. Dated at Indianapolis, Indiana, this 21st day of June, 1917.

"Fidelity Trust Company, Trustee,
By W. M. Fogarty, President.

"Attest
James G. Flaherty, Secretary"

NINETEENTH: That after the execution of said deeds of conveyance and written memorandum set forth in paragraph of this finding designated third, fourth and fifth, and prior to the demand for repayment and tender of deed of reconveyance set forth in the ninth paragraph of this finding, the plaintiff, William V. Rooker acting for himself and his wife, and co-

plaintiff, Dora E. Rooker, did on several occasions express and convey to defendant, the Fidelity Trust Company, their intentions to pay off the advancements, more specifically set forth in this finding, theretofore made by it under said deeds and memorandum and take reconveyance of said land and otherwise by their course and conduct did induce said demand for repayment and tender of re-conveyance.

TWENTIETH: That said Fidelity Trust Company, Trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said Trust agreement, hereinbefore set out, but that said Marion County Lands were not sold within one year after the execution of said memorandum and deeds, and have not yet been sold by said trustee under said trust provisions; that ninety (90) days notice in writing was given, as set forth in the previous findings, notifying the plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that the plaintiffs have been, were then and are now asserting an interest in said lands adverse to the rights of said Trust Company, as Trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands, adverse to the right of the said Trust Company, as Trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above.

That the plaintiffs, in open court, have disputed and now deny the right of the said Trust Company as Trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and now are resisting the sale of said lands or any of them by said Trustee, and are now prosecuting an appeal in the appellate court from a judgment of the Marion Circuit Court, quieting the title of the Marion County lands in said Fidelity Trust Company as Trustee, and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as Trustee to said Marion County lands and from denying, disputing, obstructing

or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust.

That the assertion of interest in said lands by plaintiffs as herein above stated adverse to the interest of Fidelity Trust Company as Trustee, under said trust agreement is unfounded and without right. Upon the foregoing facts the court states the following conclusions of law:

1. The law is with the defendant on the issues joined on plaintiffs' complaint.

2. The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

3. The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant, Fidelity Trust Company, Trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

4. The defendant and cross-complainant, Fidelity Trust Company, is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

5. The defendant and cross-complainant is entitled to judgment on account in the sum of $50,697.00 to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

6. The defendant and cross-complainant is entitled to recover its costs in this action taxed at $————

The court having found the facts specially and stated its conclusion of law thereon, now renders judgment accordingly.

It is therefore considered, ordered, adjudged and
13 decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant, Fidelity Trust Company, as such Trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen, (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of
14 White River.

Also that part of the northeast quarter of section thirteen (13) township, eighteen (18) north, range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods more or less, to White River thence southerly along said stream with the

meanderings thereof to be a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres more or less situated in Marion County, Indiana.

It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, Trustee, is entitled to judgment on this account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker, and William V. Rooker, by said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker, under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as Trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale,

conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

It is further considered, ordered adjudged and decreed that said Fidelity Trust Company as such Trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand ($18,000) Dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said Trustee shall, after giving said plaintiffs ninety (90) days notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-five Thousand ($65,000) Dollars; that if said
16 Hamilton County lands do not sell for said sum of Sixty-five Thousand ($65,000) Dollars, for lack of a bid for that sum, then said trustee, after ninety (90) days notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands, under this decree they do not fetch enough to pay the moneys and perform the obligation against said trust estate, in this action found to exist and to be due, then said trustee shall after giving thirty (30) days notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring using diligence to procure the

highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

1. To the payment of the costs of this action.

2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

5. The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her
17 heirs, executors, administrators and assigns.

From this judgment and decree appellants appeal and allege errors relied on for reversal as follows:

1. In overruling motions to strike out the appellee's second amended counter-claim.

2. In overruling the demurrers to the second amended counter-claim for insufficiency of facts.

3. In overruling motion to make second amended counter-claim more specific.

4 In overruling appellants' motion for judgment on the special findings.

5. The trial Court erred in its conclusions of law.

6. In overruling appellants' motion to modify the judgment.

7. In overruling appellants' motion for a new trial.

The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter-claim and cross-complaint of appellee. An examination of the record discloses that the pleading to which reference is here made was appellee's cross-complaint as amended after the decision of this court in the case of Rooker vs. Fidelity Trust Company, 185 Ind. 172.

The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court in this case and the exhibits attached to said cross-complaint no sufficient cross-complaint or counter-claim could have been written against appellants. This phase of the case need not be discussed in disposing of these motions for it is settled law that error can not be predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading.

Woodhams vs Jennings, 164 Ind. 555; Pfau vs. State ex rel. 148 Ind. 539.

In support of their second alleged error appellants claim that the appellee trust company could not in any event, by counter-claim sue the appellants on the subject matter of the trust estate on the facts set upon in the counter-claim for the reason that the counterclaim is not relevant or germane to the complaint.

The arguments presented by appellant in favor of their demurrers are in substance that the appellee was guilty of wrongful management of the trust property and sought to acquire title to it by wrong doing and that the trustee elected to repudiate the trust agreement and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost and it has no right to recover the sums of money expended by it for the use and benefit of the appellants.

A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor, of the defendant or which tend to reduce the plaintiff's claim or demand for damages.—Burns 1914, 355.

A counter-claim is good and germane to the principal case if it alleges matters connected with the subject of the original action.—Stanley vs. N. W. Ins. Co., 95 Ind. 254. Excelsior Clay Works vs. DeCamp, 40 Ind. App. 26.

A counter-claim under code provisions like ours is the equivalent of the cross bill in equity and in addition includes common law recoupment.—Woodruff vs. Garner 27 Ind. 4.

The purpose of a crossbill is to obtain full relief for all parties and a complete determination of all controversies which arise out of the matters charged in the original bill—10 R. C. L. p. 483.—261 et seq.

In this case the transaction having been brought into a court of equity by appellants it was not only the right of the court to entertain a crossbill which would settle all the rights of all the parties in all of their relations in the subject matter, but it was the duty of the court if neccessary, to require a cross bill to be filed which would enable it to completely
19 settle the controversy. See Sims vs. Burk, 109 Ind. 214.

A party who imagines he has two or more remedies or who misconceives his rights is not deprived of all remedy because he first tries a wrong one. Bunch vs. Graves 111 Ind. 351. Nave vs. Powell, 62 Ind. App. 274.

The doctrine of election of remedies is of equitable origin. It has no application to the circumstances of this case for to apply it here would work to the great harm and loss of the appellee trust company, and the unearned and undeserved large money benefits to appellants, moreover it does not apply unless in fact, two remedies are available, which is not true in this case, as the Supreme Court has decided in 185 Ind. 172. The court did not err in overruling the demurrers to the second amended counter-claim.

In support of their third alleged error the appellants argue at length that the counter-claim was illegal. The object of a motion to make a pleading more specific is to require the pleader to state with certainty what is vaguely stated in the pleading. Elliott's App. Proc. 665. Failey vs. Gribbling 128 Ind. 110.

The appellee, in its counter-claim set up very fully and in circumstantial detail the trust and its relation of it, and its title and doings as trustee, and the items of its account and the circumstances requiring the aid of the court in finally carrying out and closing the trust. There is no uncertainty or vagueness of statement and it is not claimed by appellants that there is. Their motion is based on what they call the illegality of the claim. The court did not err in overruling their motion to make more specific.

The court error relied on for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment on a special finding of facts is not recognized by our practice. It is elementary that the sufficiency of the evidence to sustain the finding is raised by a motion for a new trial and that questions of law raised by the conclusions of law stated on a finding can be presented only by exceptions taken to the conclusions of law. The court did not err in overruling appellants' motion for judgment on the special finding of facts.

It appears from the record that after the court filed its special finding of facts and conclusions of law thereon, the plaintiffs each respectively moved the court for judgment in their favor on the special finding of facts and when such motions were overruled they excepted to the conclusions of law. Under such circumstances the exceptions are not available.

Exceptions to conclusions of law upon facts specially found must be taken before the taking of any other step in the cause by the excepting party. Dickson et al vs. Rose 87 Ind. 103. See also Barner vs. Bayless 134 Ind. 600—Chicago R. R. vs. State ex rel 159 Ind. 237—Medical College vs. Commingore 140 Ind. 296...

Though it was taken on the same day that the ruling was made, an exception will not be available if it was not taken until after additional steps in the prosecution or defense of the case had been taken by the party reserving it. Ewbank's Manual (2d. Ed.) 24b.—Dickson vs. Rose 87 Ind. 103—Barner vs. Bayless 134 Ind. 600.

The correctness of the conclusions of law can not be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. Chicago S. E. Ry. Co. vs. State ex rel 159 Ind. 237. The judgment rendered in this case was in conformity with the conclusions of law.

The seventh error relied on for reversal by appellants is that the court erred in overruling their motion for a new trial. In support of their contention to show that the court erred in overruling said motion the appellants say that the cause was put at issue and tried on an unlawful cross-complaint;
21 and that therefore the judgment was contrary to law.

This contention was decided adversely to appellants in our ruling on the demurrers to the cross-complaint and counterclaim. The brief of appellants does not contain a condensed recital of the evidence in narrative form as required by the rules.

A statement of the evidence mixed with statements and arguments of counsel, propositions of law and citation of cases and which clearly does not purport to cover the entire evidence, does not comply with the rules of this court and does not command a consideration of a motion for a new trial involving the evidence. Rose vs. City of Jeffersonville, 185 Ind. 577 and cases there cited.

No question is presented on the sufficiency of the evidence. Judgment affirmed.

And afterwards, to-wit: On the 12th day of October, 1921, the Court being fully advised overruled the petition for rehearing heretofore filed herein by Appellant.

It is therefore considered by the Court that the judgment of the Court below in the above entitled cause, be in all things affirmed at the cost of the Appellant all of which is ordered to be certified to said Court.

And it is further considered by the Court, that the Appellee recover of the Appellant the sum of $48.05 for its costs and charges in this behalf expended.

THE STATE INDIANA
Supreme Court

I, Patrick J. Lynch, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said Court in the above entitled cause.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Court, at the City of Indianapolis this 13th day of October, 1921.

[SEAL] Patrick J. Lynch, C. S. C.

And afterwards to-wit, on the 16th day of November,
22 1921, the same being the 39th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had in said cause to-wit:

"Comes now the defendant in the above entitled cause and moves the court to redocket said cause, which motion is granted and said cause is now redocketed and said defendant now files therein its verified information and petition for an order to the plaintiffs therein, Dora E. Rooker and William V. Rooker, to appear in this court and before the judge thereof to show cause if any there be why they and each of them should not be punished for contempt of this court by violating the decree of injunction heretofore entered in said cause; and praying that said judgment and decree of this court heretofore entered in this cause be carried into effect; and praying for a writ of assistance to put defendant into possession of the real estate involved, which reads as follows: (Petition afterwards amended.)

"And the court does now order that said defendants be notified forthwith to be and appear in court at the Court House in the city of Noblesville, Indiana, on Monday, November 21, 1921, and then and there show cause why they shou d not be punished for contempt if any there be, and then and there to answer said information and verified petition."

And afterwards to-wit on the 21st day of November, 1921, the same being the 43rd Judicial Day, of the October Term,

1921, of said court the following further proceedings were had in said cause to-wit:

"Come now the plaintiffs and enter their special appearance and file a plea in abatement to the defendant's petition for a writ of assistance, which plea in abatement reads as follows:

State of Indiana } ss
County of Hamilton }

IN THE HAMILTON CIRCUIT COURT
OCTOBER TERM, 1921
No. 16338

Dora E. Rooker, Et Al
vs.
Fidelity Trust Company, Trustee

PLEA IN ABATEMENT

Dora E. Rooker and William V. Rooker, hereby enter
23 their special appearance to the "Petition for Writ of Assistance, etc." filed herein by the Fidelity Trust Company, Trustee, on the 16th day of November, 1921, for the sole purpose of pleading to the jurisdiction of this Court over the subject matter of said petition and over the persons of these respondents to said petition and for cause these respondents say:

1. That these respondents claim the right and privilege to take this cause direct from the Supreme Court of Indiana to the Supreme Court of the United States for review upon Writ of Error and upon Writ of Certiorari, or either of said writs because of certain questions arising upon the decision and judgment of the Supreme Court of Indiana involving the rights of these respondents under the constitution and laws of the United States, to-wit:

A. That the Indiana Practice Act of March 15, 1913, as amended and approved March 5, 1915, entitled "An Act Concerning Proceedings in Civil and Criminal Cases" impairs the obligation of contracts, and of the contract involved in this suit in contravention of Article One of the Constitution of the United States.

B. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit

Court in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

C. That the decision and judgment of the Supreme Court of Indiana in this cause denies to these responents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

D. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

E. That the decision and judgment of the Supreme
24 Court of Indiana takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

2. That these respondents claim their right and privilege to take said cause directly to the Supreme Court of the Un ted States without the intervention of this Court, pursuant of the judicial code as amended.

3. That heretofore on the 10th day of November, 1921, these respondents filed in the office of the Clerk of the Supreme Court of Indiana their praecipe in writing for a transcript of the record, proceedings and judgment of said Supreme Court, presenting as it does present, the said Federal question involved therein, as hereinbefore stated; that prior to the filing of said praecipe these respondents paid to the said Clerk as estimate of the cost of said record; that said Clerk of the Supreme Court of Indiana informs these respondents, and upon such information they state the fact to be that said transcript will be completed and ready for delivery to them within the next ten days.

4. That these respondents have written a brief for the purpose of presenting their petition to said Supreme Court of the United States, and to the Justices thereof, for a Writ of Certiorari and a Writ of Error, or either of said writs; that at the present time more than two hundred pages of said brief

are printed and said brief is ready for completion when respondents obtain the transcript of said record from the Clerk of the Supreme Court of Indiana, so that, from said transcript, these respondents may insert in said brief the proper page references to contents of said transcript.

5. That these respondents are pursuing with due diligence their effort to take said cause for review, as aforesaid, to the Supreme Court of the United States; and it is their purpose to perfect and accomplish their said endeavors and present said cause, as aforesaid, to the Supreme Court of the United States within the time required therefor by the laws of the United States.

6. That prior to the filing of this petition in this cause, these respondents orally informed said Fidelity Trust Company and its attorneys that this cause was to be presented for review as aforesaid to the Supreme Court of the United States; that thereafter and prior to the filing of this petition for a Writ of Assistance, as these respondents are informed and believe, and upon information and belief they state the fact to be, that Charles E. Cox, one of the attorneys for the Fidelity Trust Company in this cause, went to the office of the Clerk of the Supreme Court of Indiana and made an examination of the record and made notation of the entries in this cause and of the said praecipe of these respondents for this record.

WHEREFORE, these respondents say that this Court is without jurisdiction in the premises and they demand judgment that this proceeding abate, and they pray for all proper relief.

Christian & Waltz,
W. V. Rooker,

Attys for Dora E. Rooker and William V. Rooker.

Dora E. Rooker and William V. Rooker, being first duly sworn, say that they are the respondents in the matter above entitled, and as such they make this affidavit and say that the foregoing plea is true, as therein averred.

Dora E. Rooker.
William V. Rooker.

Subscribed in my presence and sworn to before me, this 21st day of November, 1921.

Witness my hand and official seal.

Maude I. Dale,
Notary Public.

My Com. Expires Oct. 10, 1922.

And afterwards to-wit on the 25th day of November, 1921, the same being the 47th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had in said cause to-wit:

Come now the parties and defendant files a demurrer
26 to plaintiffs plea in abatement which demurrer reads as follows:

State of Indiana)
Hamilton County) ss

IN THE HAMILTON CIRCUIT COURT
OCTOBER TERM, 1921

Dora E. Rooker, et al vs Fidelity Trust Company Trustee	No. 16338 DEMURRER TO PLAINTIFF'S PLEA IN ABATEMENT TO DEFENDANT'S PETITION FOR WRIT OF ASSISTANCE, ETC.

The defendant in the above entitled cause demurs to plaintiff's plea in abatement to defendant's petition for writ of assistance, etc., therein and for cause of demurrer says that said plea in abatement does not state sufficient facts to abate such petition.

Chas. E. Cox,
Henry Seyfried,
Attorneys for Defendant.

MEMORANDUM

1. In so far as the petition is an information of a contempt by the violation of the injunction decree, the plea in abatement addresses no averments to it, and hence, it can not be abated on this plea. The plea being addressed to the pleading as an

entirety it is of course, therefore subject to demurrer for want of facts.

2. But if the plea did contain averments directed to the petition as an information, and if it was conceded that a plea in abatement would lie to such an information, nevertheless the plea is bad for the rule is that an appeal, even with a supersedeas, does not annul an order of injunction, and a party who disobeys the order by an act done after the appeal may be punished for contempt.

3. In no case does an appeal without a bond stay execution of any sort on the judgment or decree appealed from. No bond was ever given in the appeal from the judgment and decree in this case nor does it appear from the averments of the
27 plea in abatement that it is purposed to give one in the proposed appeal to the Supreme Court of the United States.

4. The only effect of an appeal to a court of error is to stay execution on the judgment from which it was taken. In all other respects, the judgment, until it is annulled or reversed stands binding on the parties, as to every question decided. The judgment may be sued on though appealed, and of course can be carried into effect.

5. There is nothing more averred here in the plea than an intention and certain preliminary steps towards appealing from the Supreme Court of Indiana to the Supreme Court of the United States. Such averments can not serve to abate the petition of defendant.

6. It is not averred in the plea that the plaintiffs intend to apply for a supersedeas. It is not and can not be shown that they can procure a supersedeas. Hence the plea is not sufficient to abate the petition.

7. As a plea in abatement it lacks that high degree of certainty and particularity of averments of facts required by the law for such pleas which are not favored and against which all intendments are taken.

Chas. E. Cox,
Henry Seyfried,
Attorneys for defendant.

Said demurrer is now sustained by the court to which ruling the plaintiffs except. And plaintiffs are now ruled to answer or demur to the petition for writ of assistance not later Nov. 28th, 1921."

And afterwards to-wit on the 28th day of November, 1921, the same being the 49th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had in said cause to-wit:

"Come now the parties and the plaintiff files separate and several motions to separate the causes of action, contained in the application for citation and writ of assistance which separate motions read as follows:

28 State of Indiana } ss
County of Hamilton }

IN THE HAMILTON CIRCUIT COURT,
OCTOBER TERM, 1921.

Dora E. Rooker, et al
vs.
Fidelity Trust Company } MOTION TO SEPARATE

Dora E. Rooker, and William V. Rooker move the court to require the defendant to separate its petition into paragraphs and number them in such manner as to state separately:

(1) The facts and the relief sought in respect of the application for a writ of assistance.

(2) To state separately the facts and the relief sought in respect of the proceedings in contempt.

F. G. Christian,
W. V. Rooker,
Attorneys for Plaintiffs.

Each of said motions is now sustained by the court to which each of said motions the defendant excepts.

And the defendant asks leave of court to amend its petition by striking out that part of the petition asking for a citation for contempt. Leave is now granted and said petition is now

amended by striking out that part asking for citation for contempt, which petition so amended reads as follows:

State of Indiana } ss
29 County of Marion }

IN THE HAMILTON CIRCUIT COURT,
OCTOBER TERM, 1921.

Dora E. Rooker, et al. Plaintiffs vs. Fidelity Trust Company, Trustee Defendant	No. 16338 PETITION FOR WRIT OF ASSISTANCE, ETC.

The Fidelity Trust Company, Trustee, defendant and cross-complainant in the above entitled cause, respectfully shows to the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiffs' complaint and upon defendant's counter-claim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counter-claim and cross-complaint; that this court, on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee then held the legal title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

All of the west half of the north half of section eighteen (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres, more or less.

Also the southwest quarter of section seven (7), town-
30 ship eighteen (18) north, range five (5) east, lying west

of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

Also, the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods, more or less, to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres more or less, situated in Hamilton County, Indiana.

And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less, situated in Marion County, Indiana.

It was, in said judgment and decree, further adjudged and decreed that this defendant was then and there entitled to judgment on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

It was further in said judgment and decree adjudged and decreed that said plaintiffs had then parted with all their title to said real estate, and the appurtenances thereunto belonging, and the right to the possession thereof and the use rents and profits thereof, and that they then had no interest therein other than an interest in the proceeds of the sale of said real estate contingent wholly upon a sale thereof at such a price that, after the payment or costs, liens, said judgment on account for $50,697 and the further reimbursement of said

defendant trustee of such sum or sums as might accrue to it in the execution of said trust an unappropriated sum might still remain in defendant's hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds, aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and ob-
31 structive of the comp'etion of the execution of said trust by said defendant and that said plaintiffs were then and there and thereby, each and both perpetually injoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give possession and from in any manner interfering with disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands.

It is further, in said judgment and decree, ordered adjudged and decreed that said defendant, trustee should proceed, under the terms of the deeds and trust agreement under which it held title, to sell said land and to proceed and first make sale of said Marion County lands and later to make sale of said Hamilton County lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or disapproval.

Said judgment and decree further directed the application of the proceeds of such sales.

And defendant further avers, that at the conclusion of the hearing and trial of said cause and before the finding and judgment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered by the agreement of the parties to said action, plaintiffs and defendant, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton County lands and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn, and to collect the proceeds and apply and distribute

the same under the direction of the court; that said trust company did appear in open court on said day and did accept said trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from
32 said trust.

And defendant further avers that said plaintiffs filed in the Supreme Court of Indiana a vacation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issue staying execution on said judgment and that the same has been and remained in full force and effect and is now, that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and that thereafter plaintiffs filed a petition for a rehearing thereof which was on October 12, 1921, in all things overruled and said judgment became absolutely final.

And plaintiff further avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure a purchaser and to sell said Marion County real estate; that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, of Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court that such exceptions and objections were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay or proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained and is now in full force and effect; that defendant did, pursuant to said order execute its deed by delivering to said Triangle Company and received the consideration of said sale, to-wit, the sum of $16,000.

And defendant further avers that notwithstanding the afore-

said judgment and decree of December 21, 1918, said
33 plaintiffs, Dora E. Rooker and William V. Rooker, have at all times since claimed to be the owners of said real estate and entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendant; that without right and without the knowledge of this defendant and without the knowledge or approval of the court, said plaintiff procured said Wainwright Trust Company, receiver as aforesaid to make leases to one West for the crop, years 1919 and 1920, of the tillable parts of said Hamilton County lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amount and value of which are at this time unknown to defendant, and did deliver one-half thereof to said Dora E. Rooker and said William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that said plaintiffs unlawfully and in violation of the decree of this court, converted said crops to their own use; that in the year 1920, said plaintiffs without the knowledge of defendant or this court took the rental of said Hamilton County lands out of the hands of this courts receiver, said Wainwright Trust Company, and themselves rented the same to one Thomas West for a grain rent for the crop year 1921 providing therein that he should deliver the landlord's share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one-half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921, produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlord's share thereof fifty tons of the value of $600.00 which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3,000 bushels of corn of the net value of $1,000 of which plaintiffs are claiming one-half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threatening said West with legal action if he does not comply
34 with such demand and are seeking by threats and

intimidation to prevent him from gathering his share of said corn if he does not so comply.

And defendant further avers that at the time of the sale of said Marion County land in 1919 as aforesaid there was then on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlord's share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it of all of which said tenant was then and there informed by defendant; that said plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's share of said crops, and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant, and to hold possession thereof as such and to deliver to them the landlord's share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of 1921, continued to do; that in the years 1919, 1920 and 1921, said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of , 1921, said purchaser received possession of said lands and put
35 its own tenant in possession thereof whereupon, on the day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant, was a trespasser on said premises

and that he, Rooker, was the owner thereof with the right to the possession and use thereof.

And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held possession of the dwellings and other appurtenances of said Hamilton County lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against said lands, including taxes, insurance, etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiffs' conduct and the depreciation of said property it can not now be sold at a price which will pay the costs and expenses and reimburse it fully for its outlay and interest.

And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton County lands and appurtenances which demand was refused by them and they and each of them refused to comply therewith.

36 And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn in to the case, or involved in it or decided either by the Circuit Court of Hamilton County or the Supreme Court of Indiana; that said proposed appeal is for the sole purpose of attempting

to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

And defendant avers that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

Wherefore defendant prays the court that said cause be redocketed and that this court's former judgment and decree may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurtenances and by putting defendant into possession thereof; and that a writ of assistance be awarded to defendant to put it in possession of said lands and appurtenances and to oust said plaintiffs, their agents, servants and all acting for and claiming under them.

And defendant prays for all proper relief in the remispes which a court of equity may accord.

Charles E. Cox,
Henry Seyfried,
Attorneys for Defendant,
Fidelity Trust Company, Trustee.

State of Indiana, Marion County ss:

I, William M. Fogarty, being duly sworn, on oath do say, that I am the President of The Fidelity Trust Company of Indianapolis, Indiana; that said trust company as trustee is the defendant in the above entitled cause of action and that the matters and facts averred in the above and foregoing petition are true in substance and in fact as I am informed and believe.

William M. Fogarty

Subscribed and sworn to before me, this 15th day of November, 1921.

My commission expires Oct. 6, 1925.

James E. Rocap,
[SEAL] Notary Public.

The plaintiffs separately and severally file demurrer
37 to the application for writ of assistance, which demurrer reads as follows:

State of Indiana } ss
County of Hamilton }

IN THE HAMILTON CIRCUIT COURT
OCTOBER TERM, 1921

Dora E. Rooker et al vs. Fidelity Trust Company, Trustee	No. 16338 DEMURRER TO THE PETITION

Dora E. Rooker and William V. Rooker demur to the petition of the Defendant, Trustee, as amended and for their demurrer plaintiffs say:

1. That there is a defect of parties plaintiff in said petition in this, to-wit: That upon the proceedings and judg-
38 ment recited in said petition and the record of this court pertaining thereto, it is apparent that said judgment is the joint judgment of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company, in its corporate capacity proper, is not a co-petitioner in said petition nor is it made a defendant to answer thereto nor in any wise required to assert its interest in the premises, nor is there any showing in said petition that said interest of the Fidelity Trust Company in its corporate capacity proper has been transferred to and is held by the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company in its corporate capacity proper should be joined as a co-petitioner in said petition or it should be named as a defendant thereto and the reasons shown why said Fidelity Trust Company in its corporate capacity proper fails to join in said petition.

2. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that the Wainwright Trust Company is receiver of the lands in controversy situate in Hamilton County in the State of Indiana; that said receiver is

a necessary and proper person to these proceedings and said petition should require the Wainwright Trust Company to appear and answer as to its interest in the premises.

3. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that Thomas West is tenant of the lands in controversy situate in Hamilton County in the State of Indiana; that said tenant is a necessary and proper person to these proceedings and said petition should require the said Thomas West to appear and answer as to his interests in the premises.

4. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit:
39 That it is named in said petition that James L. Wheatley is tenant of the lands in controversy situate in Marion County in the State of Indiana; that said tenant is a necessary and proper person to these proceedings and said petition should require the said James L. Wheatley to appear and answer as to his interests in the premises.

5. That said petition does not state facts sufficient to constitute a cause of action as a petition for a writ of assistance.

6. That said petition as amended is not verified.

MEMORANDUM

For their memorandum with their demurrer in respect of the insufficiency of said petition to state a cause of action, these plaintiffs say:

1. That the judgment sued on is a joint judgment and cannot be enforced singly.

2. That the Fidelity Trust Company, Trustee, is not the real party in interest.

3. That it is not shown that the Fidelity Trust Company in its corporate capacity proper withholds its consent from this proceedings.

4. That the writ of assistance is not a primary writ but is issued only in aid of a prior process of court and that no such process has been issued out of this court on this judgment.

5. That no execution ever has been issued on the judgment and decree of court mentioned in said petition.

Respectfully submitted

F. G. Christian,
W. V. Rooker,
Attorneys for Plaintiff.

Said demurrers are overruled by the court to which of each separate rulings the plaintiffs separately except. The Plaintiffs now file an answer to the petition, for writ of assistance which answer reads as follows:

40 Dora E. Rooker, et al
vs.
Fidelity Trust Company, Trustee

No. 16338
ANSWER TO THE PETITION FOR WRIT OF ASSISTANCE.

Dora E. Rooker and William V. Rooker, plaintiffs in the cause above entitled, for their answer to the petition for a writ of assistance say, that they deny each and every allegation therein contained.

F. G. Christian.
W. V. Rooker.

And afterwards to-wit on the 8th day of December, 1921, the same being the 58th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had to-wit:

"Come now the plaintiffs and file a second paragraph of answer to the petition for writ of assistance, which second paragraph of answer reads as follows:

State of Indiana } ss
Hamilton County }

IN THE HAMILTON CIRCUIT COURT
AT THE OCTOBER TERM, A. D. 1921

Dora E. Rooker, et al
vs
Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker

No. 16338

SECOND PARAGRAPH OF ANSWER

2. Dora E. Rooker and William V. Rooker, plaintiffs in the cause above entitled, but who are made defendants to the information and petition, filed under in said cause by the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, for their further defense to said information and petition say: That this Honorable Court, should not proceed further in this cause for that on to-wit, the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the clerk of the Supreme Court of the United States and caused to be docketed as an action pending in said court their petition for a writ of certiorari to be issued out of said court to the Supreme Court of Indiana, to bring to said
41 Supreme Court of the United States a transcript of the record proceedings and judgment of the Supreme Court of Indiana in Cause No. 23,598 in said court wherein the said Dora E. Rooker and William V. Rooker are appellants and the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker are appellees; that said Cause No. 23,598 in the Supreme Court of Indiana is the same cause on appeal as No. 16,338 in this court and the judgment sought to be revised and corrected on said writ of certiorari is the same judgment and none other, upon which in this proceeding the said Fidelity Trust Company relies; that there are presented in said petition for a writ of certiorari certain Federal questions in the form and manner following, to-wit:

"THE FIRST FEDERAL QUESTION

1. The Indiana Civil Practice Act of March 15, 1913 as amended and approved March 5, 1915, is a state law impairing the obligation of contracts, and is in contravention of Article 1, Section 10, of the Constitution of the United States. The evil of this act reposes in the fact that it admits the substitution of "conclusions" in the place of facts in pleadings, evidence, verdicts and judgments of courts. The effect of the statute is that contracts can be declared upon as meaning what they do not mean and thereby that causes can be tried upon false issue, to the injury of litigants.

The second amended counter claim and as supplemented pleads conclusions in contravention of the facts and proceeds upon the theory:

FIRST: That by their deeds and trust agreement these petitioners parted with all their interest in the trust estate, together with the right of possession and the ownership of the rents and profits, accepting as true the pleaders' conclusions in the second amended counter-claim, and as supplemented the trial court adopted the theory that these petitioners by their deeds and trust agreement, having parted with all their interest in the trust estate, together with the right of
42 possession and the ownership of the rents and profits, were not competent to present any issue affecting the misfeasance or malfeasance of the trustee, to which the trustee was bound to respond, and to effectuate this theory the trial court held and decided adversely to these petitioners every question they raised, including:

a. It denied the various motions to strike out the second amended counter claim.

b. It denied the various motions to make more specific the second amended counter claim.

c. It overruled the various demurrers to the second amended counter claim and as supplemented.

d. It overruled every objection made by these petitioners at the trial of the cause, to the introduction of various matters in evidence.

e. It made a special finding of facts in which it denied that these petitioners had any interest in the trust estate or in its administration.

f. It denied the motion of these petitioners for judgment on the special findings.

g. It stated conclusions of law adverse to the claims of these petitioners that as *cestuis que trust* they had a competent interest in the trust estate which entitled them to complain of its repudiation by the trustee, of the trustee's renunciation of the duties; of the acts of misfeasance and malfeasance of the trustee in the administration of its office.

h. It rendered judgment upon the complaint and upon the counter claim adverse to the claim of these petitioners that as *cestuis que trust* they had a competent interest in the trust estate which entitled them to complain of its repudiation by the trustee, of the trustee's renunciation of its duties, of the acts of misfeasance and malfeasance of the trustee in the administration of its office.

i. It entered its injunction against these petitioners prohibiting them forever from asserting any claims, interest
43 or right in respect of the trust estate and its administration, and held that their sole interest and right was to receive from the trustee any residue which the trustee should turn over to them at the end.

j. It denied that the act of repudiation of October 28, 1912, had any potency to impeach the trustee upon the complaint of these petitioners.

k. It denied that the original cross complaint of the Fidelity Trust Company, declaring upon the trust deed as a mortgage had any potency to impeach the trustee upon the complaint of these petitioners.

l. It denied that the sheriff's sales of all the real estate of the trust estate, made upon the order and direction of the Fidelity Trust Company in execution of its judgment rendered upon the foreclosure of the trust deed as a mortgage had any potency to impeach the trustee on the complaint of these petitioners.

m. It denied every question raised in this case and many which were not raised in it, in such manner as to exclude and foreclose any and every claim, interest and right of these petitioners in and to the trust estate during the term of its administration.

SECOND: Accepting as true the pleader's conclusions in the second amended counter claim and as supplemented, that the claim therein described was a debt in fact and in law, the trial court held that said debt was matured so that it could go to judgment, and this notwithstanding the total absence of a time limitation upon which the debt might mature, and in the absence of a time limitation of any stated contract to pay,

notwithstanding the absence also of any misconduct or default on the part of these petitioners by which the maturity of said debt was advanced or fixed, and in the absence of both a time limitation and of any misconduct or default on the part of these petitioners, notwithstanding the absence also of any issue tendered by the trustee that it had been delinquent
44 but that it had done acts and deeds beneficial to the trust estate and accepted by it which exceeded in value the wrongs done by the trustee to the trust estate in its maladministration. And having adopted this theory of the maturity of debt the court made rulings which included the following:

a. It denied the various motions to strike out the second amended counter claim.

b. It denied the various motions to make more specific the second amended counter claim.

c. It overruled the various demurrers to the second amended counter claim and as supplemented.

d. It overruled every objection made by these petitioners at the trial of the cause to the introduction of various matters in evidence.

e. It made a special finding of facts in which it found that the debt was matured and these findings were adverse to the pleadings and the evidence.

f. It denied the motion of these petitioners for judgment on the special findings.

g. It stated conclusions of law adverse to the showing made upon the pleadings and proof that said claim was not a debt matured.

h. It overruled petitioners' exceptions to the conclusions of law.

i. It rendered judgment adverse to the facts as shown upon the pleadings and proof, and adjudged said claim to be a debt matured and competent to enter into judgment.

j. It overruled the motions of these petitioners for new trial.

k. It fixed the penalty of the appeal bond at the excessive sum of $65,000.00 in order to prevent an appellate review of said judgment.

THIRD: Accepting as true the pleader's conclusions in the second amended counter claim as supplemented, that the counter claimants therein had well and duly performed all
45 the conditions on their part to be performed, and this notwithstanding said pleadings showed upon their face that said averment was sham and false, the court made rulings which included the following:

a. It denied the various motions to strike out the second amended counter claim.

b. It denied the various motions to make more specific the second amended counter claim.

c. It overruled every objection made by these petitioners at the trial of the case to the introduction of various matters in evidence.

e. It denied all probative effect of the act of repudiation of October 28, 1912.

f. It denied all probative effect of the pleadings upon which issue was joined at the first trial of this cause.

g. It denied all probative effect of the first judgment in this cause.

h. It denied all probative effect of the sheriff's deed of June 8, 1915, whereby the Marion County lands of the trust estate were conveyed upon its own execution sale to the Fidelity Trust Company.

i. It denied all probative effect of the sheriff's deed of September 28, 1915, whereby the Hamilton County lands of the trust estate were conveyed upon its own execution sale to the Fidelity Trust Company.

j. It made a special finding of facts, in which it denied the probative effect of uncontroverted evidence of the trustee's misfeasance and malfeasance in office from October 28, 1912, to the date of said finding.

k. It made a special finding of facts, in which it denied the probative effect of the opinion and judgment of the Supreme Court on the first appeal of this case.

l. It denied the motions of these petitioners for judgment on the special findings.

m. It stated conclusions of law adverse to the pleadings, the proof and the special findings.

46 n. It fixed the penalty of the appeal bond at the excessive sum of $65,000.00 in order to prevent an appellate review of the record, proceedings and judgment of the trial court.

o. It rendered judgment adverse to the pleadings, the proof and the special findings.

THE SECOND FEDERAL QUESTION

2. The judgment of the Hamilton Circuit Court of Indiana deprives these petitioners of their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. This quality of the court's judgment traces to the Practice Act of March 15, 1913, as amended and approved March 5, 1915, which not only impairs the obligation of the contract, but has the further vice that it strikes down the precedents in procedure and allows the court to act arbitrarily and without the essentials of jurisdiction, and to hear and determine cases upon false issues.

First. The judgment of the Hamilton Circuit Court wrongfully and unlawfully denied to these petitioners, and each of them, the remedies for the enforcement and protection of their rights, which existed at law at the time said contract was made and which entered into and became a part of the consideration of said contract and were its obligation, to-wit:

a. That fictions in pleadings were abolished in Indiana and that suits and actions could be instituted, maintained and defended only by the real parties in interest.

b. That in all suits and actions recovery must be had *secundum allegata et probata* or not at all.

c. That the terms of a written instrument could not be varied with parol evidence.

d. That where a written instrument entered into and became a part of any pleading, proof, finding, verdict or judgment of the court, the terms of said instrument prevailed over any conclusion to the contrary in said pleading, proof, finding, verdict or judgment.

e. That the *cestui que trust* was the equitable owner of the trust estate and because of such interest could maintain suits and actions for the protection and benefit of the trust,
47 as against a delinquent trustee.

f. That repudiation of a trust contract by the trustee was an actionable wrong for which *cestui que trust* could bring and maintain his suit or suits against the delinquent trustee.

g. That where repudiation occurred by the trustee the *cestui que trust* could sue to defend and conserve the trust property.

h. That where repudiation of a trust by the trustee occurred and action was thereupon begun against the trustee by the adversary parties in interest, there could be no reinstatement of the trust other than a conventional reinstatement, and this required the making of a new contract by and between the parties in interest, the reinstatement in every such instance being contractual.

i. That it was within the province of the courts to enforce contracts, but not to make them.

k. That where an act of repudiation was accomplished by a trustee, thereupon the trustee waived, surrendered and abandoned his rights under the contract, except that he became, as against the trust estate, a creditor as on a general account for any benefits received by the trust estate in excess of damages sustained because of the trustee's delinquency.

l. That where one had been a trustee became by his own misconduct a mere general creditor of the trust estate, then he had no such interest thereafter in the trust estate as would protect him in making any further payments or advancements of money to the credit of the trust, but all such subsequent payments and advancements were and would be held to be voluntary and not actionable.

m. That a complaint, and the proof to sustain it, and the verdict or findings of the court thereon, should be good as to all who joined therein or it would be bad as to all.

n. That it was an act of repudiation of the trust for
48 a trustee to join with a creditor in a suit against the trust estate.

o. That a trust estate was entitled to have its day in court and that no judgment could be rendered against it unless it was represented in the case by some person qualified competent and having an interest.

p. That the denial to the trust estate of the remedies in its behalf which existed at the time the trust contract was made and which entered into the consideration thereof and become its obligation, are stated in the particular rulings specified under "The First Federal Question" *supra*, to which reference is hereby made for greater certainty.

THE THIRD FEDERAL QUESTION

3. The judgment of the Supreme Court of Indiana deprives these petitioners of their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. This quality of the court's judgment traces not only to vices of the Practice Act of March 15, 1913, as amended March 5, 1915, as stated in Points 1 and 2 *supra*, but the judgment of the Supreme Court has the additional vice that it was made *coram non judice* by the disqualification of the court, one of the members of which, Judge Louis B. Ewbank, who had a large and vital interest and duty, both personal and fiduciary, in the precedents to be established by this case, and these interests and duties of Judge Ewbank were hostile to and in derogation of the rights of these petitioners in this case. These disqualifying interests and duties of Ewbank, and the method of their disclosure to petitioners, are recited in the assignment of errors as it relates to the ruling on the petition for a rehearing.

4. The judgment of the Hamilton Circuit Court of Indiana denies to these petitioners the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States *quoad hoc;* the court holds that these petitioners because of their trust deed, creating
49 the trust and lodging the legal title of the property in the trustee for the purposes of the trust, thereby parted with all their interest in the affected property, and therefore have no standing in court to protect their trust estate as against the misfeasance and malfeasance of the malevolent

trustee, who had repudiated the trust and announced its obligations thereunder. The petitioners contend that the *cestuis que trust* are the equitable owners of the affected property that this interest of the *cestuis que trust* continues until the final determination of the trust and that where the trust agreement calls for performance *in pais* to determine the trust that judicial determination thereof cannot be substituted for that which the parties agreed upon as the consideration for and obligation of their contract.

First. The fourth federal question arises upon the record in the same manner as the first and second federal questions arise, and as to statement of the *supra* reference is hereby made for greater certainty.

THE FIFTH FEDERAL QUESTION

5. The judgment of the Supreme Court of Indiana denies to these petitioners the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States. The merit of this point and its determination involves collectively those issues and matters which are severally stated in Points 1, 2, 3, and 4 *supra*.

THE SIXTH FEDERAL QUESTION

6. The judgment of the Supreme Court of Indiana denies to these petitioners due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States, in holding that these petitioners should be denied the remedies and processes of the law because to apply them in behalf of petitioners would work to the great harm and loss of appellee trust company, and to the unearned and undeserved large money benefits to appellants.

First. The sixth federal question arises upon the face of the opinion of the Supreme Court as it assumes to state
50 and to interpret the record, and includes the following points, namely:

a. The Supreme Court erred in holding that the rescission of the act of repudiation of the trust, made by the trustee, was not a contractual right of the parties, but was a mere matter of judicial remedy. The application of this doctrine of rescission

controls the right to make contracts and by substituting for that right the judicial power to create a contractual status for these petitioners, the court denies to these petitioners the equal protection of the laws. It imposes upon them a conventional status without their consent. Rescission is a contractual right and not a judicial remedy in the first instance.

b. The Supreme Court erred in holding that the election of remedies was a doctrine which applied only where there were in fact two remedies available, and that these petitioners waived their exceptions to the conclusions of law by moving for judgment on the special findings, although there was in fact no such remedy known to the law as a motion for judgment on the special findings. The Supreme Court refused to consider the motion for judgment on the special findings because there was no such remedy known to the practice, and thereupon refused to consider the exceptions to the conclusions of law because the petitioners had sought the countervailing remedy of a motion for judgment. This ruling withholds from the petitioners remedial rights upon the same terms which it grants them to respondents and all in respect of matters vital in the case. This is the denial of the equal protection of the laws.

c. The Supreme Court erred in holding that the only remedy the respondents and was to sue upon the contract as "fully and duly performed." This is an erroneous statement of the law, and as a recital of the record it is false in fact. It is one of those erroneous "conclusions" which the Practice Act of March 15, 1913, as amended and approved March 5, 1915, assumes to qualify the courts to put forth in the place and stead of the facts and of the truth. In the prayer of the amended complaint, these petitioners ask that any sum they may be found to owe the respondents be ascertained and that an exact time be fixed for its payment, and that a receiver
51 be appointed to proceed with the execution of the trust.

Again in their motions to strike out the second amended counter claim, in their motions to make that pleading more specific and in their demurrers thereto, the petitioners distinctly pointed out that three forms of action were available; namely, (1) action on the contract as having been completely per-

formed, (2) action on the contract as having been broken by these petitioners and recovery by the respondents on the *quantum meruit*, employing the contract to fix the measure of damages, (3) action on the contract as having been breached by the respondents, but with the averment that while acting under the contract, respondents had done acts and expended money in excess of the damages suffered by the trust estate because of respondents' breach of the trust contract. The rule that recovery must be had *secundum allegata et probata* was material in choosing the truthful one of these three remedies. The trial record in rulings on evidence, the special findings, the conclusions of law and the judgment all impeach, rather than sustain, the theory and averments of the second amended counter claim, to the effect that the counter claimants had duly and lawfully performed all the conditions to be by them performed. Denying to petitioners the benefit of these rules of remedial procedure was a denial to petitioners of the equal protection of the law, and the denial was unspeakable when the Supreme Court, as it did do, based the denial on the ground that the application of the rule "here would work to the great harm and loss of the appellee trust company."

And the said Dora E. Rooker and William V. Rooker now here aver that each and all said federal questions are involved in the present record of this court in this cause at this time.

That along with their said petition for a writ of certiorari so filed in the office of the Clerk of the Supreme Court of the United States the said Dora E. Rooker and William V. Rooker filed thirty copies of their brief on said petition and they caused said petition to be noted for submission to the
52 court Tuesday the 3rd day of January, 1922, when the court convenes or as soon thereafter as counsel can be heard; that thereafter they served on the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, notice of said motion to submit and delivered to them a copy of said petition for writ of certiorari and brief thereon and they thereafter transmitted said notice of motion and proof of service thereof to the Supreme Court of the United States and caused the same to be noted on the docket of said court where

said cause is now pending; that upon the facts in the premises the jurisdiction of this cause is now wholly and exclusively in the Supreme Court of the United States and this court should proceed no further.

Wherefore these plaintiffs and cross defendants demand judgment.

Christian & Waltz,
W. V. Rooker,
Attorneys for Plaintiff and
Cross-defendants.

And afterwards to-wit on the 9th day of December, 1921, the same being the 59th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had in said cause to-wit:

"Comes now the defendant and files motion to strike out plaintiffs' second paragraph of answer to the petition for a writ of assistance, which motion reads as follows:

State of Indiana)
County of Hamilton) ss

IN THE HAMILTON CIRCUIT COURT
OCTOBER TERM, 1921

Dora E. Rooker, et al
vs.
Fidelity Trust Company, Trustee } No. 16338

MOTION TO STRIKE OUT
PLAINTIFFS' SECOND PARAGRAPH OF ANSWER
TO DEFENDANT'S PETITION

The defendant in said cause moves the Court to reject
53 and strike from the files of the cause the second paragraph of plaintiffs' answer to defendant's writ of assistance herein, for the reason that said paragraph of answer avers facts in the nature of abatement and not in bar of said petition.

Charles E. Cox,
Henry Seyfried,
Attorneys for Defendant.

And afterwards to-wit on the 10th day of January, 1922, the same being the 2nd Judicial Day, of the January Term, 1922, the following further proceedings were had in said cause to-wit:

"Come now the parties and plaintiffs ask leave of court to withdraw their answer to defendant's petition for writ of assistance and to file an additional answer. Leave is now granted by the court and said answer as heretofore filed is now withdrawn and plaintiffs file an additional answer in the following words and figures to-wit:

State of Indiana)
Hamilton County) ss

IN THE HAMILTON CIRCUIT COURT

Dora E. Rooker, et al vs. Fidelity Trust Company, et al	No. 16338 Complaint
Cross Petition of Fidelity Trust Company as Trustee, etc. vs Dora E. Rooker, et al	Cross-Petition

2. Dora E. Rooker and William V. Rooker, defendants to the cross petition herein of the Fidelity Trust Company as trustee of the estate of Dora E. Rooker for their second and further plea to the jurisdiction of this court in the matter of the cross petition of the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, say:

That the court should proceed no further in this matter for the reason that the jurisdiction of the subject matter of this cause and of the parties thereto is exclusively in
54 the Supreme Court of the United States upon the facts following, to-wit:

1. On the 12th day of October, 1921, this cause was pending in the Supreme Court of Indiana on appeal from the judgment of this court in the controversy herein and on said day said Supreme Court overruled said petition for rehearing.

2. On the 14th day of December, 1921, these defendants to said cross petition and plaintiffs in said principal case, and appellants in said cause in the Supreme Court of Indiana, filed in the office of the Clerk of the Supreme Court of Indiana their petition for a writ of error to the Supreme Court of the United States in said cause and they filed at the same time and in the same place their assignment of errors; that thereupon said petition for a writ of error was presented to the Chief Justice of the Supreme Court of Indiana who allowed the same and fixed the appeal bond at the penal sum of one thousand dollars conditioned as provided by law for the payment of all damages and costs and approved the New Amsterdam Casualty Company of New York as surety on said bond; that thereupon said bond so fixed and conditioned was approved by the Chief Justice of the Supreme Court of Indiana and filed in said cause in the office of the clerk of said Supreme Court.

3. On the 15th day of December, 1921, the writ of error of the Supreme Court of the United States issued in the name of the President, bearing teste of Noble C. Butler, Clerk of the District Court of the United States and the seal of said court, was filed by these defendants in said cause in the office of the Clerk of the Supreme Court of Indiana.

4. On the 17th day of December, 1921, these defendants as appellants in said cause in the Supreme Court of Indiana and as plaintiffs in error in said cause in the Supreme Court of the United States, filed in the office of the clerk of the Supreme Court of Indiana, their citation to the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust
55 Company as trustee of the estate of Dora E. Rooker, commanding their presence as required by law in said cause in the Supreme Court of United States, and together with said citation these defendants filed with said citation in the office of the Clerk of the Supreme Court of Indiana the acknowledgment of service thereof on said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as said trustee.

5. That on the 19th day of December, 1921, these defendants, as said appellants in the Supreme Court of Indiana and as said plaintiffs in error in said cause in the Supreme Court of

the United States lodged for said defendants in error a copy of said writ of error in the office of the clerk of the Supreme Court of Indiana.

6. That on the 22nd day of December, 1921, these defendants as said plaintiffs in error in said cause in the Supreme Court of the United States filed their praecipe in the office of the Clerk of the Supreme Court of Indiana for a transcript of the record proceedings and judgment of the Supreme Court of Indiana in said cause, and with said praecipe they filed the acknowledgment of service thereof on said defendants in error.

7. That these defendants are informed and believe that the clerk of the Supreme Court has at this time practically completed said transcript and he informs them, and upon information they state the fact to be, that said clerk will have said transcript in the office of the clerk of the Supreme Court of the United States, all within the manner and time provided by law.

Wherefore these defendants pray judgment that this court proceed no further and that they be discharged hence with their costs and they pray for all proper relief.

Christian & Waltz,
W. V. Rooker,
Attorneys for Defendants.

William V. Rooker being first duly sworn upon his oath says that he is one of the defendants in the matters above entitled on said cross petition; that the facts in the premises lie particularly within the knowledge of this affiant and not of
56 his co-defendant; that for himself and his co-defendant he makes this affidavit and says that the facts stated in the foregoing answer and plea are true and further affiant saith not.

William V. Rooker.

Subscribed in my presence and sworn to before me this day of January, 1922.

Witness my hand and official seal. My commission expires

J. D. Hill,
Clerk of the Hamilton C. C.

And afterwards to-wit on the 27th day of February, 1922, the same being the 43rd Judicial Day, of the January Term, 1922, of said court the following further proceedings were had in said cause to-wit:

"Comes now the Fidelity Trust Co., trustee, and files petition for leave to enter into a lease contract with one Thomas West, for the lands held by it, by the terms of the trust deed herein, for the year 1922, which petition reads as follows:

State of Indiana)
Hamilton County) ss

IN THE CIRCUIT COURT, JANUARY TERM, 1922

Dora E. Rooker, et al vs. Fidelity Trust Company, Trustee	No. 16338 PETITION FOR APPROVAL OF LEASE

The Fidelity Trust Company, Trustee, respectfully represents and shows to the court that it has, since the affirmance by the Supreme Court of Indiana of the decree of this court wherein and whereby your trustee was directed to sell the lands and tenements in Hamilton County, Indiana, described therein as provided in said decree and pursuant to the terms of the trust agreement involved in said action and said decree, made effort to so sell said lands and tenements; that it has not been able to do so and will not be able to do so before the beginning of the crop year on March 1, 1922, for the reason that the plaintiff are now attempting to perfect an appeal
57 of said cause from the Supreme Court of Indiana to the Supreme Court of the United States; that on July 31, 1918, by agreement of the parties the Wainwright Trust Company was appointed temporary receiver to take charge of the said property and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn; that thereafter this court entered its judgment and decree for this trustee, which judgment and decree was thereafter finally affirmed by the Supreme Court of Indiana; that the aforesaid receiver had abdicated and neglected its duties wholly and has never reported to this court; that unless said tillable lands are rented and farmed for the crop year of 1922 it will cause

loss and waste to the trust estate; that therefore, your trustee has tentatively leased said tillable lands to one Thomas West for said year on a basis of grain rent and prays the lease thereof to him may be approved by the court and ordered delivered.

Fidelity Trust Company, Trustee,
By J. Albert Smith,
Vice-President.

J. Albert Smith being duly sworn on his oath says that he is Vice President of the Fidelity Trust Company which is trustee and defendant in the above cause and as such is informed of the facts set forth in the above and foregoing petition and that the same are true.

J. Albert Smith.

Subscribed and sworn to before me this 27th day of February, 1922

A. E. Sauch, Notary Public.

My commission expires Oct. 4, 1925.

Said petition is now granted by the court and said trustee now presents to the court its lease contract with said Thomas West, which lease contract is now approved by the court and reads as follows: (Not on file)

And afterwards to-wit on the 4th day of March, 1922,
58 the same being the 48th Judicial Day, of the January Term, 1922, of said court the following further proceedings were had to-wit:

"Comes now Dora E. Rooker and William V. Rooker, and enter their special appearance for the purpose of setting aside and vacating the approval by the court of the lease entered into by the Fidelity Trust Company and one Thomas West as entered of record on the 27th day of February, 1922, which special appearance and objections are in the following words and figures to-wit:

State of Indiana }
County of Hamilton } ss

IN THE HAMILTON CIRCUIT COURT

Fidelity Trust Company, Trustee
vs. No.
Dora E. Rooker, et al

Dora E. Rooker and William V. Rooker specially appearing herein for the purposes only of this motion move the court to set aside and vacate the order and judgment and proceedings had thereon, made and entered herein on to-wit, the 27th day of February, 1922, and for cause the said Dora E. Rooker and William V. Rooker say:

1. That said order and judgment and the proceedings had thereon are wholly void for the reason that the same were made, entered and taken wholly without any notice whatever to the said Dora E. Rooker and William V. Rooker, or either of them and wholly without their information and without the information of either of them.

2. That the jurisdiction of the parties to the subject matter of the proceedings herein complained of is and for many weeks continuously last past has been exclusively in the Supreme Court of the United States as must be and is apparent upon the facts in the premises to-wit: The real estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are
59 a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker, as plaintiffs and the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at one time but not since the year 1919 pending in this court as Cause No. 16338; that on to-wit, the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in this court in said cause; that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of this court; that on to-wit, the 22nd day of June, 1921, the Supreme Court of

Indiana affirmed said judgment of this court and thereafter on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on to-wit, the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States and to the Justices thereof for a writ of error to the Supreme Court of Indiana in said cause; that afterwards on to-wit, the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker lodged in the office of the clerk of the Supreme Court of the United States their transcript of said record proceedings and judgment and at the same time the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a writ of certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana and said petition was duly docketed as a cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money all as required by the rules and practice
60 of the Supreme Court of the United States; that afterwards on to-wit, the 15th day of December, 1921, the writ of error of the Supreme Court of the United States in said cause was issued on the petition therefor of the said Dora E. Rooker and William V. Rooker and at the same time Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for the payment of all damages, and costs which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, Dora E. Rooker and William V. Rooker filed their citation, and the proof of service thereof, in the office of the clerk of the Supreme Court of Indiana; that on December 19th, 1921, Dora E. Rooker and William V. Rooker lodged in said Clerk's Office a copy of said writ of error in said cause for said Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as trustee of the estate

of Dora E. Rooker; that on December 22nd, 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record proceedings and judgment of said Supreme Court in said cause on said writ of error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and is now pending as Cause No. 785, October Term, 1921, in the Supreme Court of the United States and for the better identification of said Cause, and for greater certainty, the said Dora E. Rooker and William V. Rooker now make reference to the said proceedings and judgment of this court in said cause No. 16338.

3. That said order and judgment of February 27, 1921, and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the 14th Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatsoever to the said Dora E. Rooker and William V. Rooker, or
61 either of them and without their having any knowledge whatsoever that said petition upon which said order and judgment were founded was filed and pending and being heard and determined in this court. That the first time said Dora E. Rooker and William V. Rooker or either of them learned of said order proceedings and judgment of February 27, 1922, was on the afternoon of March 3, 1922.

4. That said order and judgment and the proceedings had thereon take the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the 14th Amendment to the Constitution of the United States, for the reason that the Court in which said order and judgment and the proceedings had thereon were taken was wholly without jurisdiction of the parties and the subject matter of said petition for the reasons hereinbefore stated in recital of the steps taken to lodge and vest the jurisdiction over said parties and over said subject matter in the Supreme Court of the United States.

Wherefore the said Dora E. Rooker and William V. Rooker pray the judgment of this court that said order and judgment and the proceedings had thereon of February 27, 1922, be adjudged and held to be null and void and they pray that this court proceed no further; and they ask for all proper relief.

Christian & Waltz,
W. V. Rooker,

Attorneys for Dora E. Rooker, et al.

State of Indiana, County of Hamilton, ss

Dora E. Rooker and William V. Rooker, being first duly sworn on their oaths say that they are the defendants in the matter above entitled and that the foregoing answer is true and in substance and in fact.

And further they say not.

Dora E. Rooker.
William V. Rooker.

Subscribed and sworn to before me this 4th day of March, 1922.

[SEAL] J. D. Hill, Clerk.

62 And afterwards to-wit on the 7th day of March, 1922, the same being the 50th Judicial Day, of the January Term, 1922, of said court the following further proceedings were had to-wit:

"Come now the parties and the motion of Dora E. Rooker and William V. Rooker to vacate the order of approval of the lease made between one Thomas West and Fidelity Trust Company is now overruled by the court to which ruling the said Dora E. Rooker and William V. Rooker excepts."

State of Indiana }
Hamilton County } ss

IN THE HAMILTON CIRCUIT COURT

Dora E. Rooker,
William V. Rooker,
Plaintiffs.
vs.
Fidelity Trust Company in its Corporate Capacity Proper,
Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker,
Defendants.

No. 16338

PRAECIPE FOR TRANSCRIPT

To the Clerk of the Hamilton Circuit Court of Indiana:

For the purposes of appellate review in the Supreme Court of the United States, upon supplemental Writ of Error and upon supplemental Writ of Certiorari, and for the purpose of contempt proceedings in the Supreme Court of the United States, on motion to commit for contempt and on attachment for contempt, you will please make out a full, true and complete transcript of all the record, pleas, proceedings, orders and judgments of your court in the cause above entitled to the date of this praecipe and beginning with and including the filing of the opinion, judgment and mandate of the Supreme Court of Indiana rendered and given in this cause on June 22, 1921, and to said transcript you will attach an original of this praecipe with the proof of service thereof and when said transcript shall have been completed you will affix thereto your certificate as provided by law over your hand and the seal of your court.

W. V. Rooker,
Attorney for Plaintiffs.

The defendants in the cause above entitled will please take notice that on Wednesday, the 5th day of April, 1922, the plaintiffs in said cause will file this their praecipe for a tran-

script of the record in the office of the clerk of the
64 Hamilton Circuit Court of Indiana.

W. V. Rooker,
Attorney for Plaintiffs.

Received copy of the above this day of April, 1922.

Attorney for Defendants.

State of Indiana }
County of Marion } ss

William V. Rooker being first duly sworn on his oath says: That on the 4th day of April, 1922, he served the foregoing notice of praecipe by delivering a copy thereof to Mr. James G. Flaherty, Secretary of the Fidelity Trust Company at the office of said trust company in the City of Indianapolis during the hours of business; that Mr Flaherty thereupon informed this affiant that Charles E. Cox, attorney for said trust company in said cause, was on that day absent from the city, but that he was to return presently whereupon said Flaherty would deliver said copy of said praecipe to said Cox; that previously on said day this affiant had called at the office of said Cox to serve on him said notice of praecipe, but affiant was then and there informed by the clerk in said office that said Cox was absent and would not return during the day; that after said visit to the office of said Cox this affiant called at the office of Mr. Henry Seyfried and delivered copies of said notice and praecipe to the clerk in charge of said office and requested that said Seyfried examine said notice and sign the same on his coming into his office; that thereafter this affiant called at the office of said Seyfried and received from his clerk the copies of said notice and praecipe unsigned together with a written memorandum from said Seyfried declining to sign said notice; that thereupon affiant served said notice upon said Flaherty as above stated.

And further affiant saith not.

William V. Rooker.

Subscribed and sworn to before me this 4th day of April, 1922. Witness my hand and official seal.

Mary Brown,
Notary Public.

My commission expires January 13, 1926.

66 State of Indiana }
County of Hamilton } ss

I, J. D. Hill, Clerk of the Hamilton Circuit Court of Indiana, do hereby certify the above and foregoing transcript is a full, true and complete transcript of all the record of said Court in Cause No. 16338 wherein Dora E. Rooker et al are plaintiffs and Fidelity Trust Company in this corporate capacity proper et al are defendants, made beginning on and since the 26th day of October, 1921, when the Clerk of the Supreme Court of Indiana filed in this office his certified copy of the opinion, judgment and mandate of said Supreme Court in said cause; that said transcript includes all papers filed, except where any has been amended and there the fact of amendment is noted and where a paper has not been filed in said cause it is noted as not on file; that said transcript includes also, all orders and judgments made and rendered, and included in said transcript is an original of the praecipe as said praecipe was filed in my office, by William V. Rooker, as attorney for plaintiffs, on this 5th day of April, 1922.

In Witness Whereof I hereunto affixed my hand and the seal of said Court at my office in the city of Noblesville, in Hamilton County, in the State of Indiana this 5th day of April, 1922.

J. D. Hill,

[SEAL] Clerk of the Hamilton Circuit Court.

Office Supreme Court, U. S.
FILED
MAY 15 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

[redacted]

[redacted]

285

LAW NO. 785 OCTOBER TERM 1921

ON WRIT OF ERROR

PETITION FOR SUPPLEMENTAL WRIT OF CERTIORARI WITH TRANSCRIPT

DORA E. ROOKER — WILLIAM V. ROOKER

Petitioners

VS.

FIDELITY TRUST CO., in its Corporate Capacity Proper — FIDELITY TRUST CO., as trustee of the Estate of Dora E. Rooker

Respondents

FLOYD G. CHRISTIAN,
RALPH H. WALTZ,
of Counsel.

WILLIAM VELPEAU ROOKER
Attorney for Petitioners

LEVEY, INDPLS.



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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 634 October Term 1921

PETITION FOR CERTIORARI

Dora E. Rooker,
William V. Rooker,
Petitioners
vs.
Fidelity Trust Company In
Its Corporate Capacity Proper,
Fidelity Trust Company As
Trustee of the Estate of
Dora E. Rooker
Respondents

To The Honorable The Supreme Court Of The United States:

Your petitioners respectfully show to this court that since the opinion, judgment and mandate of the Supreme Court of Indiana in this cause was filed in the office of the Clerk of the Hamilton Circuit Court of Indiana, said Hamilton Circuit

Court unlawfully and without right has taken certain steps; has entertained certain motions, pleas and proceedings in pretended contemplation of carrying out said mandate of the Supreme Court of Indiana, and thereupon, these petitioners make this their supplemental petition for a Writ of Certiorari in said cause to be directed to the Hamilton Circuit Court of Indiana, to-wit:

I

(1.) These petitioners now hereby reaffirm all the averments and they now seek all the relief stated in their original petition for Writ of Certiorari except as the same may be modified by this, their supplemental petition for a Writ of Certiorari wherein they respectfully show to this court:

(a.) That there arise upon the record in the case of Dora E. Rooker and William V. Rooker, plaintiffs, against the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, defendants, in the Hamilton Circuit Court of Indiana, certain Federal questions, to-wit:

(1.) Said Hamilton Circuit Court erred in its ruling, order and judgment of March 7, 1922, in overruling the motion of the said Dora E. Rooker and William V. Rooker to set aside and vacate the order and judgment of said Hamilton Circuit Court, and the proceedings had thereon, made and entered on to-wit: the 27th day of February, 1922, which motion was to the effect following:

(a.) That said order and judgment and proceedings had thereon were wholly void for the reason that the same were made, entered and taken without any notice whatever to said Dora E. Rooker and William V. Rooker, or either of them, and wholly without their information and without the information of either of them.

(b.) That the jurisdiction of the parties to the subject matter of the proceedings stated in said motion was, and for many weeks continuously last past had been, exclusively in the Supreme Court of the United States, as must be and was apparent upon the facts in the premises, to-wit: The real

estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker, as plaintiffs, and the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at one time, but not since the year 1919, pending in said Hamilton Circuit Court as Cause No. 16,338; that on to-wit: the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in said Hamilton Circuit Court in said cause; that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that on, to-wit: the 22nd day of June, 1921, the Supreme Court of Indiana affirmed said judgment of said Hamilton Circuit Court and thereafter, on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on, to-wit: the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States and to the Justices thereof for a Writ of Error to the Supreme Court of Indiana in said cause and for a Writ of Certiorari to be directed to the Supreme Court of Indiana by the Supreme Court of the Unted States in said cause; afterwards, on to-wit: the 5th day of December, 1921 the said Dora E. Rooker and William V. Rooker lodged in the office of the Clerk of the Supreme Court of the United States their transcript of said record, proceedings and judgment and at the same time the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a Writ of Certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana, and said petition was duly docketed as cause pend-

ing in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money, all as required by the rules and practice of the Supreme Court of the United States; that afterwards on, to-wit: the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States in said cause was issued on petition therefor of the said Dora E. Rooker and William V. Rooker, and at the same time said Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for the payment of all damages and costs, which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker filed their citation and proof of service thereof in the office of the Clerk of the Supreme Court of Indiana; that on December 19, 1921, the said Dora E. Rooker and William V. Rooker lodged in said Clerk's office a copy of said Writ of Error in said cause for said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that on December 22, 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court in said cause on said Writ of Error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and was pending as Cause No. 785, October Term, 1921, in the Supreme Court of the United States at the time when said proceedings were had, as herein complained of, in said Hamilton Circuit Court of Indiana in said cause.

(c.) That said order and judgment of February 27, 1921, of the Hamilton Circuit Court of Indiana and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said order and judgment were

taken wholly without any notice whatever to the said Dora E. Rooker and William V. Rooker, or either of them, and without their having any knowledge whatsoever that the petition upon which said order and judgment were founded was filed and pending and being heard and determined in said Hamilton Circuit Court.

(d.) That said order and judgment and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said Hamilton Circuit Court in which said order and judgment and the proceedings had thereon were taken, was wholly without jurisdiction of the parties and the subject matter of said petition for the reasons heretofore stated in recital of the steps taken to lodge and vest the jurisdiction of said parties and of said subject matter in the Supreme Court of the United States.

II

(a.) The Hamilton Circuit Court of Indiana erred in taking and exercising jurisdiction of the petition filed on the 27th day of February, 1922, said petition being to the effect following:

The Fidelity Trust Company, Trustee, represented to the court that said Trustee since the affirmance by the Supreme Court of Indiana of the decree of said Hamilton Circuit Court directing said Trustee to sell the lands and tenements in Hamilton County, Indiana, belonging to and constituting a part of the trust estate of Dora E. Rooker, had made effort to sell said land and tenements but had not been able to do so and would not be able to do so before the beginning of the crop year on March 1, 1922, for the reason that the plaintiffs, Dora E. Rooker and William V. Rooker, were now attempting to perfect an appeal of said cause from the Supreme Court of Indiana to the Supreme Court of the United States; that unless said Hamilton County lands of said trust estate were rented and farmed for the crop year 1922 it would cause loss and waste to said trust estate and that, therefore, said trustee had tentatively leased said lands to one Thomas West for

said year on a basis of grain rent, which lease said trustee then and there tendered the court and asked that the same be approved by the court and ordered delivered.

(b.) The Hamilton Circuit Court erred in sustaining the petition of the Fidelity Trust Company, Trustee, approving the lease of lands of said trust estate in said Hamilton County and in ordering said lease to be delivered and in placing said Thomas West in possession of said lands; that said order and judgment of said Hamilton Circuit Court takes the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(c.) The Hamilton Circuit Court of Indiana erred in disregarding and denying the additional answer of Dora E. Rooker and William V. Rooker to the petition of the Fidelity Trust Company as Trustee for a Writ of Assistance, which additional answer was filed in said Court on the 10th day of January, 1922, and was to the effect following, to-wit: That the said Dora E. Rooker and William V. Rooker made their plea by said answer to the jurisdiction of said Hamilton Circuit Court in the matter of the petition of the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker for a Writ of Assistance, the said plea of Dora E. Rooker and William V. Rooker to the jurisdiction of said Hamilton Circuit Court in the premises being to the effect following: to-wit: That said Hamilton Circuit Court should proceed no further in the premises for the reason that the jurisdiction of the subject matter of the cause and the parties thereto was exclusively in the Supreme Court of the United States upon the facts following, to-wit: On the 12th day of October, 1921, this cause was pending in the Supreme Court of Indiana on appeal from the judgment of said Hamilton Circuit Court and on said day said Supreme Court overruled a petition for rehearing; on the 14th day of December, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana, their petition for a Writ of Error to the Supreme Court of the United States in said cause and they filed at the same time and in the same place their Assignment

of Errors; that thereupon said petition for a Writ of Error was presented to the Chief Justice of the Supreme Court of Indiana, who allowed the same and fixed the appeal bond at the penal sum of One Thousand Dollars, conditioned as provided by law for the payment of all damages and costs and approved the New Amsterdam Casualty Company of New York as surety on the bond; that thereupon said bond so fixed and conditioned was approved by the Chief Justice of the Supreme Court of Indiana and filed in said cause in the office of the Clerk of said Supreme Court; that on the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States issued in the name of the President, bearing teste of Noble C. Butler, Clerk of the District Court of the United States for the District of Indiana and the seal of said court, was filed by the said Dora E. Rooker and William V. Rooker in said cause in the office of the Clerk of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker as appellants in said cause to the Supreme Court of Indiana and as plaintiffs in error in said cause in the Supreme Court of the United States, filed in the office of the Clerk of the Supreme Court of Indiana their citation to the Fidelity Trust Company in its corporate capacity proper and the Fidelty Trust Company as Trustee of the estate of the said Dora E. Rooker, commanding their presence as required by law in said cause in the Supreme Court of the United States and together with said citation said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana the acknowledgment of service of said citation on said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as said Trustee; that on the 19th day of December, 1921, said Dora E. Rooker and William V. Rooker as said appellants in the Supreme Court of Indiana, and the said plaintiffs in error in said cause in the Supreme Court of the United States lodged for said defendants in error a copy of said writ of error in the office of the Clerk of the Supreme Court of Indiana; that on the 22nd day of December, 1921, said Dora E. Rooker and William V. Rooker filed their praecipe in the office of the Clerk of the Supreme Court of Indiana for a transcript of the record, proceedings and judgment of the Supreme Court of

Indiana in said cause and with said praecipe they filed the acknowledgment of service thereof on said defendants in error; that said Dora E. Rooker and William V. Rooker upon information and belief stated that the Clerk of the Supreme Court of Indiana had at that time practically completed said transcript and had informed them that he would have said transcript in the office of the Clerk of the Supreme Court of the United States all within the time and manner provided by law.

III

That the Hamilton Circuit Court erred in accepting and retaining jurisdiction of a certain petition filed on the 16th day of November, 1921, in said cause by the Fidelity Trust Company as Trustee for an attachment for contempt against Dora E. Rooker and William V. Rooker and for a Writ of Assistance to put said Fidelity Trust Company in possession of lands of the trust estate in said Hamilton County which said motion for attachment and petition for Writ of Assistance were in substance as follows, to-wit:

"The Fidelity Trust Company, Trustee, defendant and cross-complainant in the above entitled cause, respectfully shows to the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiff's complaint and upon defendant's counterclaim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counterclaim and cross-complaint; that this court on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee, then held the legal title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

"All of the West half of the north half of section eighteen (18), township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad containing ninety-two (92) acres, more or less.

"Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

"Also the southeast quarter of section twelve (12) township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

"Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty two rods more or less to White River, thence southerly along said stream with the meanderings thereof to a point 29.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County Indiana.

"And the southeast quarter of the northeast quarter of section thirty-three (33) township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34) township seventeen (17) north of range four (4) east, containing forty (40) acres, more or less, situated in Marion County, Indiana.

"It was in said judgment and decree further adjudged and decreed that this defendant was then and there entitled on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

"It was further in said judgment and decree adjudged and decreed that said plaintiffs had then parted with all their

title to said real estate, and the appurtenances thereunto belonging and the right to the possession thereof, and the use, rents and profits thereof, and that they then had no interest therein other than an interest in the proceeds of the sale of said real estate contingent wholly upon a sale thereof at such a price that, after the payments of costs, liens, said judgment on account for $50,697, and the further reimbursement of said defendant trustee of such sum or sums as might accrue to it in the execution of said trust an unappropriated sum might still remain in defendant's hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and obstructive of the completion of the execution of said trust by said defendant and that said plaintiffs were then and thereby each and both perpetually enjoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give possession and from in any manner interfering with, disputing, or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands.

"It is further in said judgment and decree ordered and adjudged and decreed that said defendant, trustee, should proceed under the terms of the deeds and trust agreement under which it held title, to sell said lands and to proceed and first make sale of said Marion County lands and later to make sale of said Hamilton County lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or disapproval.

"Said judgment and decree further directed the application of the proceeds of such sales.

"And further defendant avers that at the conclusion of the hearing and trial of said cause and before the finding and judg-

ment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered by the agreement of the parties to said action, plaintiffs and defendants, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton county lands, collect the proceeds and apply and distribute the same under the direction of the court; that said trust company did appear in open court on said day and did accept said trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from said trust.

"And defendant further avers that said defendants filed in the Supreme Court of Indiana a vacation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issued to stay execution on said judgment and that the same has been and remained in full force and effect and is now, and that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and thereafter plaintiffs filed a petition for a rehearing thereof which was on October 12, 1921, in all things overruled, and said judgment became absolutely final.

"And plaintiff avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure a purchaser and to sell said Marion County real estate; that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court as that such objections and exceptions were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay of proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained, and is now

in full force and effect; that defendant did, pursuant to said order execute its deed by delivering the same to said Triangle Realty Company and received the consideration of said sale, to-wit, the sum of $16,000.

"And defendant further avers that notwithstanding the aforesaid judgment and decree of December 21, 1918, said plaintiffs Dora E. Rooker and William V. Rooker, have at all times since claimed to be the owners of the said real estate and entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendants; that without right and without the knowledge of this defendant and without the knowledge or approval of the court said plaintiff procured said Wainwright Trust Company receiver as aforesaid, to make leases to one West for the crop years 1919 and 1920, of the tillable parts of said Hamilton County lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amount and value of which are at this time unknown to the defendant, and did deliver one-half thereof to said Dora E. Rooker and William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that said plaintiff unlawfully and in violation of the decree of this court converted said crops to their own use; that in the year 1920 said plaintiff without the knowledge of defendant or this court took the rental of said Hamilton County lands out of the hands of the court's receiver, said Wainwright Trust Company, and themselves rented the same to one Thomas West for a grain rent for the crop year 1921 providing therein that he should deliver the landlord's share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one-half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921 produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlord's share thereof fifty tons of the value of $600.00, which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3,000 bushels of corn of

the net value of $1,000 of which plaintiffs are claiming one-half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threatening said West with legal action if he does not comply with such demand and are seeking by threats and intimidation to prevent him from gathering his share of said corn if he does not so comply.

"And defendant further avers that at the time of the sale of said Marion County land in 1919 as aforesaid there was then on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs; that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlord's share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it all of which said tenant was then and there informed by defendant; that said plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's share of said crops and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant and to hold possession thereof as such and to deliver to them the landlord's share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of 1921 continue to do so; that in the years 1919, 1920 and 1921, said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time, and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of 1921, said purchaser received posses-

sion of said lands and put its own tenant in possession thereof, thereupon on the day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant, was a trespasser on said premises and that he, Rooker, was the owner thereof with the right to the possession and use thereof.

"And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held possession of the dwellings and other appurtenances of said Hamilton County lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against said lands, including taxes, insurance, etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiffs' conduct and the depreciation of said property it can not now be sold at a price which will pay the costs and expenses and reimburse it fully for its outlay and interest.

"And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton County lands and appurtenances which demand was refused by them and they and each of them refuses to comply therewith.

"And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn into the case, or involved in it or decided either by the Circuit Court of Hamilton County

or the Supreme Court of Indiana; that said proposed appeal is for the sole purpose of attempting to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

"And defendant avers that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

"Wherefore defendant prays the court that said cause be redocketed and that this court's former judgment and decree may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurtenances and by putting defendant into possession thereof; and that a Writ of Assistance be awarded to defendant to put it in possession of said land and appurtenances and to oust said plaintiffs their agents, servants and all acting for and claiming under them, and defendant prays for all proper relief in the premises which a court of equity may accord."

IV

The Hamilton Circuit Court of Indiana erred in sustaining the demurrer of the Fidelity Trust Company as Trustee to the plea in abatement of Dora E. Rooker and William V. Rooker filed in said court under their special appearance to the petition for Writ of Assistance, etc. which plea in abatement was in substance, as follows:

"Dora E. Rooker and William V. Rooker, hereby enter their special appearance to the 'Petition for Writ of Assistance, etc.' filed herein by the Fidelity Trust Company, Trustee, on the 16th day of November, 1921, for the sole purpose of pleading to the jurisdiction of this court over the subject matter of said petition and over the persons of these respondents to said petition and for cause these respondents say:

"1. That these respondents claim the right and privilege to take this cause direct from the Supreme Court of Indiana to the Supreme Court of the United States for review upon Writ of Error and upon Writ of Certiorari, or either of said writs, because of certain questions arising upon the decision and judgment of the Supreme Court of Indiana involving the rights of these respondents under the constitution and laws of the United States, to-wit:

"A. That the Indiana Practice Act of March 15, 1913, as amended and approved March 5, 1915, entitled 'An Act Concerning Proceedings in Civil and Criminal Cases' impairs the obligation of contracts, and of the contract involved in this suit in contravention of Article One of the Constitution of the United States.

"B. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

"C. That the decision and judgment of the Supreme Court of Indiana in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

"D. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

"E. That the decision and judgment of the Supreme Court of Indiana takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

"2. That these respondents claim their right and privilege to take said cause directly to the Supreme Court of the United States without the intervention of this court pursuant of the judicial code as amended.

"3. That heretofore on the 10th day of November, 1921, these respondents filed in the office of the Clerk of the Supreme Court of Indiana their praecipe in writing for a transcript of the record, proceedings and judgment of said Supreme Court presenting as it does present, the said Federal questions involved therein, as hereinbefore stated; that prior to the filing of said praecipe these respondents paid to the said Clerk an estimate of the cost of said record; that said Clerk of the Supreme Court of Indiana informs these respondents, and upon such information they state the fact to be, that said transcript will be completed and ready for delivery to them within the next ten days.

"4. That these respondents have written a brief for the purpose of presenting their petition to said Supreme Court of the United States and to the Justices thereof, for a Writ of Certiorari and a Writ of Error, or either of said writs; that at the present time more than two hundred pages of said brief are printed and said brief is ready for completion when respondents obtain the transcript of said record from the Clerk of the Supreme Court of Indiana, so that from said transcript, these respondents may insert in said brief the proper page references to contents of said transcript.

"5. That these respondents are pursuing with due diligence their effort to take said cause for review, as aforesaid, to the Supreme Court of the United States; that it is their purpose to effect and accomplish their said endeavors and present said cause, as aforesaid, to the Supreme Court of the United States within the time required therefor by the laws of the United States.

"6. That prior to the filing of this petition in this cause, these respondents orally informed said Fidelity Trust Company and its attorneys that this cause was to be presented for review as aforesaid to the Supreme Court of the United States; that thereafter and prior to the filing of this petition for a Writ of Assistance, as these respondents are informed and believe, and upon information and belief, they state the fact to be, that Charles E. Cox, one of the attorneys of the Fidelity Trust Company in this cause, went to the office of the Clerk of the Supreme Court of Indiana and made an examination of the record and made notation of the entries in this cause and of the said praecipe of these respondents for this record.

"WHEREFORE, these respondents say that this court is without jurisdiction in the premises and they demand judgment that this proceeding abate and they pray for all proper relief."

V

The Hamilton Circuit Court erred in overruling the demurrer of Dora E. Rooker and William V. Rooker to the petition for a Writ of Assistance, as amended, of the Fidelity Trust Company, as Trustee of the estate of Dora E. Rooker, said demurrer being upon the grounds, to-wit:

"That there is a defect of parties plaintiff in said petition in this, to-wit: That upon the proceedings and judgment recited in said petition and the record of this court pertaining thereto, it is apparent that said judgment is the joint judgment of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company, in its corporate capacity proper, is not a co-petitioner nor is it made a defendant to answer thereto nor in any wise required to assert its interest in the premises, nor is there any showing in said petition that said interest of the Fidelity Trust Company in its corporate capacity proper has been transferred to and is held by the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company in its corporate capacity proper should be joined as a co-petitioner in said petition or it should be named as a defendant thereto and the reasons shown why said Fidelity Trust Company in its corporate capacity proper fails to join in said petition.

"2. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that the Wainwright Trust Company is receiver of the lands in controversy situate in Hamilton County in the State of Indiana; that said receiver is a necessary and proper party to these proceedings and said petition should require the Wainwright Trust Company to appear and answer as to its interest in the premises.

"3. That there is a defect of the parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that Thomas West is tenant of the lands in controversy situate in Hamilton County in the State of Indiana; that said tenant is a necessary and proper party to these proceedings and said petition should require the said Thomas West to appear and answer as to his interests in the premises.

"5. That said petition does not state facts sufficient to constitute a cause of action as a petition for a writ of assistance.

"6. That said petition as amended is not verified.

MEMORANDUM

"For their memorandum with their demurrer in respect of the insufficiency of said petition to state a cause of action these plaintiffs say:

"1. That the judgment sued on is a joint judgment and can not be enforced singly.

"2. That the Fidelity Trust Company, Trustee, is not the real party in interest.

"3. That it is not shown that the Fidelity Trust Company in its corporate capacity proper withholds its consent from this proceedings.

"4. That the Writ of Assistance is not a primary writ but is issued only in aid of a prior process of court and that no such process has been issued out of this court on this judgment.

"5. That no execution ever has been issued on the judgment and decree of court mentioned in said petition."

VI

The Hamilton Circuit Court of Indiana had no jurisdiction to enter upon the execution of the mandate of the Supreme Court of Indiana pursuant of its opinion and judgment while the same was pending for review in the Supreme Court of the United States and the proceedings had in said Hamilton Circuit Court in the premises were *coram non judice* and void.

VII

The Hamilton Circuit Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate because by their deeds of trust they had sold and conveyed the trust estate to the Trustee in its own right and the Trustee had purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

VIII

The Hamilton Circuit Court of Indiana erred in accepting and applying the opinion, judgment and mandate of the Supreme Court of Indiana as meaning and directing that Dora E. Rooker and William V. Rooker could, and should, be denied their day in court to redeem and defend the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate, because by their deeds of trust they had sold and conveyed the trust estate to the Trustee in its own right and the Trustee had purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

IX

The Supreme Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem from the Trustee, and defend the trust estate, upon its repudiation of the trust agreement by holding that to entertain the objections of Dora E. Rooker and William V. Rooker to the illegality of the joint counter-claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the trust estate of Dora E. Rooker would work to the harm and prejudice and financial loss of the Trustee and to the undeserved gain of the said Dora E. Rooker and William V. Rooker and by said denial said Supreme Court of Indiana took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

X

The Hamilton Circuit Court of Indiana erred in accepting and applying the opinion, judgment and mandate of the Supreme Court of Indiana as meaning that Dora E. Rooker

and William V. Rooker could, and should be denied their day in court to challenge the illegality of the joint counterclaim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, because to entertain that challenge would work to the harm and prejudice of said Trustee and to the undeserved gain of said Dora E. Rooker and William V. Rooker, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, your petitioners are advised and believe that said proceedings and each of them of the Hamilton Circuit Court in said cause are erroneous in the particulars hereinbefore enumerated, and that this Honorable Court should require the case to be certified to for its review and determination in conformity with the provision of Section 237 of the Judicial Code as amended, said proceedings in said Hamilton Circuit Court being taken under the pretended authority of the opinion, judgement and mandate of the Supreme Court of Indiana in said cause, the same being a final decision by the highest court of Indiana competent to decide said case. A certified copy of the entire record of the Hamilton Circuit Court of Indiana in said cause under said pretended opinion, judgment and mandate is hereby furnished, attached to and made part of this application and marked Exhibit B in compliance with Rule 37 of this Honorable Court.

WHEREFORE, your petitioners respectfully pray that a Supplemental Writ of Certiorari may be issued out of and under the seal, of this court directed to the Hamilton Circuit Court of Indiana commanding said court to certify and send to this court on a certain day to be therein designated a full, true and complete transcript of the record and proceedings of said Hamilton Circuit Court in said cause entitled: Dora E. Rooker, William V. Rooker, Plaintiffs, vs. Fidelity Trust Company in Its Corporate Capacity Proper, Fidelity Trust Company, Trustee of the Estate of Dora E. Rooker, defendants, to the end that said cause may be reviewed and determined

by this court as provided by Section 237 of the Judicial Code as amended; or, that your petitioners may have such other or proper relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that said judgment of the Supreme Court of Indiana in said case and every part thereof may be reviewed by this Honorable Court, and that said proceedings, orders and judgments of said Hamilton Circuit Court in said case, and each part thereof, may be reviewed by this Honorable Court, and in all things reversed.

William Velpeau Rooker,
Attorney for Petitioners.

F. G. Christian
Ralph H. Waltz
of Counsel

State of Indiana)
County of Hamilton) ss

Dora E. Rooker and William V. Rooker being first duly sworn upon their oaths say that they are the petitioners in the foregoing petition; that said petition is true in substance and in fact; that as to the matters of law therein stated these petitioners have taken the advice of counsel; that the errors of law therein complained are substantial and the claims thereof are well founded and that said errors of law are clearly to the prejudice and damage of these plaintiffs and that these petitioners are entitled to have relief from said errors which is in the petition prayed, and further affiants saith not.

Dora E. Rooker.
William V. Rooker.

Subscribed in my presence and sworn to before me, J. D. Hill, Clerk of the Hamilton Circuit Court of Indiana this 29th day of April, 1922.

Witness my hand and seal of said Court.

(Seal: Hamilton Circuit Court of Indiana)

J. D. Hill,
Clerk, Hamilton Circuit Court.

EXHIBIT B

TRANSCRIPT

April 7, 1922. Received of W. V. Rooker, Attorney, Eighteen ($18.00) Dollars, cost of the transcript.

J. D. Hill, Clerk.

1 PLEAS and proceedings before the Honorable Fred E. Hines, sole judge of the Hamilton Circuit Court, the same being the 24th Judicial Circuit of the State of Indiana, at a term of said court, commenced and held at the Court House, in the City of Noblesville, on the 1st Monday in October, 1921, in the case of

Dora E. Rooker
William V. Rooker
vs.
Fidelity Trust Company
} No. 16338

BE IT REMEMBERED, That heretofore to-wit, on the 26th day of October, 1921, the Clerk of the Supreme Court, of the State of Indiana, filed in the office of the Clerk of the Hamilton Circuit Court a certified copy of the opinion and judgment of said Supreme Court, in the above entitled cause which certified copy of opinion and judgment reads as follows:

THE STATE OF INDIANA,

IN THE SUPREME COURT, MAY TERM, 1921. On the 22nd day of June, 1921, being the 27th Judicial day of said May Term, 1921.

Hon. Howard L. Townsend, Chief Justice
Hon. Louis B. Ewbank
Hon. David A. Myers — Associate
Hon. Julius C. Travis — Judges
Hon. Benjamin M. Willoughby

No. 23598
In The Case Of
Dora E. Rooker, et al.,
vs.
Fidelity Trust Company

Come the parties by their attorneys, and the court being sufficiently advised in the premises, give its opinion and judgment as follows, pronounced by Willoughby, J.

This case is a resumption of proceedings under the mandate of this court in Rooker vs. Fidelity Trust Company 185 Ind. 172. The appellants as settlers of a trust in lands sued appellee who was the trustee alleging a violation and repudiation of the trust and demanding damages, an accounting, that the appellee trustee be removed, and that a receiver be appointed for the trust estate to administer it under the terms of the trust agreement. Appellee on its part filed a cross-complaint in which it set up the same trust and its duties under it as trustee, its performance of all its duties save the sale of the trust estate, its reason for not making such sale, its purpose to carry out the sale and its hindrance by appellants interference and claim of title. It asked an accounting that its title as trustee be quieted, that appellants be enjoined and that it be decreed to make sale pursuant to the trust agreement and distribution of proceeds accordingly.

Appellants' complaint was answered by appellee trustee by general denial. Issue was formed on the cross-complaint of appellee trust company by answer of general denial and by special partial answers, the issues on the latter being made by replies in general denial. On these issues the cause was submitted to the court for trial, and the following special finding of facts and conclusions of law were made and stated by the court.

The court finds the facts to be: First, that on and prior to the 11th day of October, 1909, the plaintiff, Dora E. Rooker, was the owner in fee simple of certain real estate situate in Hamilton County, Indiana. Second: that on and prior to the 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entireties, of certain real

estate situated in Marion County, Indiana. Third: that on the said 11th day of October, 1909, said plaintiff, Dora E. Rooker and William V. Rooker, her husband, executed and delivered to said cross-complainant, Fidelity Trust Company, as trustee their warranty deed for the lands in Hamilton County.

TO HAVE AND TO HOLD, said real estate, how-
3 ever in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser: it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee.

And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances.

And to do any and all acts and to execute any and all papers, which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

And in the event any such liens or charge against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforceable by it and collectible with interest at the rate of

6% per annum, to be credited semi-annually as a debit and charge against said real estate.

THIS CONVEYANCE IS MADE subject to the 4 taxes for the years 1908 and 1909 and subject to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of certain principal note of said grantor in the sum of Fourteen Thousand ($14,000) Dollars together with interest thereon and recorded in mortgage record 52, page 84, in the office of the Recorder of Hamilton County, Indiana.

That said Indenture by Dora E. Rooker and William V. Rooker, her husband, was received for record on the 14th day of October 1909 and recorded in record 97, at page 117, in the Recorder's office of Hamilton County, Indiana.

FOURTH: That on said 11th day of October, 1909, the plaintiff William V. Rooker and Dora E. Rooker, husband and wife, executed and delivered to said cross-complainant Fidelity Trust Company as trustee, their warranty deed for the lands in Marion County.

TO HAVE AND TO HOLD said real estate, however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee, as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell the same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made

by said Fidelity Trust Company of Indianapolis, as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said Fidelity Trust Company is directed to apply the proceeds, arising from such sale in the manner and for the purpose set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

The said Fidelity Trust Company of Indianapolis, as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of 6% per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

This conveyance is made subject to the taxes for the year 1908 and 1909 and subject also to certain mortgage executed March 12, 1909, by the grantors, William V. Rooker, and Dora E. Rooker husband and wife, to the Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of six thousand ($6,000) dollars and interest coupon notes there-

on which mortgage is recorded in mortgage record 523,
6 page 128, in the office of the Recorder of Marion County, State of Indiana.

That this Indenture was received for record on the 14th day of October, 1909, and recorded in Record 52, page 101 in the office of the Recorder of Marion County, Indiana.

FIFTH: That contemporaneously with the execution of the two warranty deeds executed on the 11th day of October, 1909, to said Fidelity Trust Company, Trustee, and as part of the same transaction the plaintiffs Dora E. Rooker and William V. Rooker, as first parties and the defendant and cross-complainant, Fidelity Trust Company of Indianapolis, Indiana, as second party, executed in duplicate on the 11th day of October, 1909, a memorandum or contract in writing. (This memorandum or contract in writing is set out in full in the opinion in Rooker vs. Fidelity Trust Company, 185 Ind. beginning page 173).

SIXTH: That since the execution of said warranty deeds and said written memorandum, the plaintiff, Dora E. Rooker, has continued in the possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the plaintiffs, William V. Rooker and Dora E. Rooker, have continued in the possession of and farmed all of the real estate situated in Marion County, Indiana, and are now in possession thereof.

SEVENTH: That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff, Dora E. Rooker, has received all of the proceeds arising out of the Hamilton County real estate and has not at any time rendered an accounting to the Fidelity Trust Company, Trustee, and the plaintiffs William V. Rooker and Dora E. Rooker have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company, Trustee.

EIGHTH: That Fidelity Trust Company, Trustee, has not sold or conveyed any of the real estate conveyed to it by plaintiffs and that the title of the same is now in the said Fidelity Trust Company, Trustee, and that said Fidelity Trust

Company is not claiming or asserting any other title than the title and right set forth in the deeds of conveyance and
7 memorandum of trust, hereinbefore set out in these findings.

NINTH: That prior to the commencement of plaintiffs' action namely on or about the 15th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company, Trustee, served a written notice upon the plaintiffs demanding the payment of certain sum aggregating Nineteen Thousand Six Hundred Dollars and Four ($19,604.04) Cents and tendered for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County lands to the original grantors upon the payment of the aforesaid sum upon demand and stating that said quit claim deed will remain in the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the demand.

TENTH: That the plaintiff, Dora E. Rooker, in the constructing of her dwelling house on the Hamilton County land contracted large liabilities to various persons, firms and corporations for work and labor done and material furnished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said Fidelity Trust Company, Trustee, under said contract and upon the security evidenced by said two separate warranty deeds and agreement of trust, all executed and delivered October 11, 1909, did from time to time thereafter upon the written order and direction of the plaintiff, Dora E. Rooker, first pay out the total sum of six Thousand ($6,000) Dollars and did further, after paying on the written order and direction of said Dora E. Rooker the total sum of Six Thousand Dollars let out and expend a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the plaintiff Dora E. Rooker issued from time to time to the defendant and cross-complainant Fidelity Trust Company, directing the payment of certain obligations showing on their face the nature of the claim, the amount thereof, and the party to whom payment should be made, and

that the signature affixed thereon is the signature of the plaintiff, Dora E. Rooker.

ELEVENTH: That said Fidelity Trust Company made payment on such written orders issued from time to time by plaintiff, Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff, Dora E. Rooker, and receipted by the respective parties in whose favor the voucher is drawn aggregating the sum of $15,813.21

TWELFTH: The said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts aggregating the sum of $21,194.27.

THIRTEENTH: That no assets came into the possession of the Trustee other than lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Indiana, a corporation engaged in the business of operating a trust company under the laws of the state of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

FOURTEENTH: That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, Trustee, is entitled to have and receive for its compensation, a trustee's fee of one hundred and fifty ($150.00) Dollars, which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of two (2) per cent on loans and advancements and all moneys laid out and expended, of which One Hundred and Twenty ($120) Dollars has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant is further entitled to have and receive interest on all moneys loaned or advanced at the rate of six (6) per cent per annum.

FIFTEENTH: That the plaintiffs are entitled to the following credits, to-wit: Ninety-five ($95.00) Dollars, together with interest thereon at six (6) per cent from October 16, 1909. on account of the cancellation of insurance policy of Six Thou-

sand ($6,000) Dollars, said sum having been charged
9 against plaintiffs under the order and voucher dated October 16, 1909; also a credit of Five Hundred ($500) Dollars with interest at four (4) per cent from August 26, 1910, less Fifteen ($15) Dollars deducted from the principal amount as a premium upon the Surety Company bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company as collateral on a supersedeas in the case of William V. Rooker and Dora E. Rooker vs. Ludowici Caladon Company in the appellate court, which cause was affirmed on appeal and upon the judgment being paid said security of deposit returned; also a rebate of Four Hundred and Two and 81/100 Dollars ($402.81) representing the various amounts of penalties and costs including in various payments for taxes on the Marion County Lands.

SIXTEENTH: There is now due and owing to the defendant and cross-complainant herein from the plaintiffs cross-defendants herein, the principal sum of Thirty-seven Thousand and Seven and 48/100 ($37,007.48) Dollars; and for the interest thereon, the aggregate sum of Fourteen Thousand Two Hundred and Seventy-one and 29/100 ($14,271.29) Dollars; and for commission at two (2) per cent on all funds paid out in excess of Six Thousand ($6,000) Dollars the aggregate sum of Six Hundred and Twenty and 14/100 ($620.14) Dollars from which there shall be deducted the aggregate sum of Nine Hundred Eighty-two and 81/100 ($982.81) Dollars, together with interest thereon amounting to Two Hundred and Eighteen and 51/100 ($218.51) Dollars, being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein in the sum of Fifty Thousand Six Hundred and Ninety-seven and 59/100 ($50,697.59) Dollars.

SEVENTEENTH: That all the amounts advanced and paid out by the defendant Fidelity Trust Company, Trustee, as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker,

and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, Trustee, is entitled to reimburse itself therefor according to the terms of said trust agreement by the sale of said lands therein provided.

EIGHTEENTH: That on the 21st day of June, 1917, the defendant Fidelity Trust Company, as Trustee, served a notice upon William V. Rooker and Dora E. Rooker of which the following is a copy:

"TO WILLIAM V. ROOKER AND DORA E. ROOKER

"Pursuant to the provisions of the deed of conveyance executed to the undersigned as Trustee, on the 11th day of October, 1909, conveying to the undersigned as Trustee, the following described real estate in Marion County, State of Indiana, to-wit: The southeast quarter of the northeast quarter of section 33, Township 17 north, range 4 east, containing 40 acres more or less; also the southwest quarter of the northwest quarter of section 34, Township 17 north, range 4 east, containing 40 acres, more or less, and the memorandum executed concurrently therewith, notice is hereby given that the Fidelity Trust Company as Trustee will ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the purchaser. Dated at Indianapolis, Indiana, this 21st day of June, 1917.

"Fidelity Trust Company, Trustee,
By W. M. Fogarty, President.

"Attest
James G. Flaherty, Secretary"

NINETEENTH: That after the execution of said deeds of conveyance and written memorandum set forth in paragraph of this finding designated third, fourth and fifth, and prior to the demand for repayment and tender of deed of reconveyance set forth in the ninth paragraph of this finding, the plaintiff, William V. Rooker acting for himself and his wife, and co-

11 plaintiff, Dora E. Rooker, did on several occasions express and convey to defendant, the Fidelity Trust Company, their intentions to pay off the advancements, more specifically set forth in this finding, theretofore made by it under said deeds and memorandum and take reconveyance of said land and otherwise by their course and conduct did induce said demand for repayment and tender of re-conveyance.

TWENTIETH: That said Fidelity Trust Company, Trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said Trust agreement, hereinbefore set out, but that said Marion County Lands were not sold within one year after the execution of said memorandum and deeds, and have not yet been sold by said trustee under said trust provisions; that ninety (90) days notice in writing was given, as set forth in the previous findings, notifying the plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that the plaintiffs have been, were then and are now asserting an interest in said lands adverse to the rights of said Trust Company, as Trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands, adverse to the right of the said Trust Company, as Trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above.

That the plaintiffs, in open court, have disputed and now deny the right of the said Trust Company as Trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and now are resisting the sale of said lands or any of them by said Trustee, and are now prosecuting an appeal in the appellate court from a judgment of the Marion Circuit Court, quieting the title of the Marion County lands in said Fidelity Trust Company as Trustee, and enjoining the plaintiffs herein from denying or disputing the title of

12 said Fidelity Trust Company as Trustee to said Marion County lands and from denying, disputing, obstructing

or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust.

That the assertion of interest in said lands by plaintiffs as herein above stated adverse to the interest of Fidelity Trust Company as Trustee, under said trust agreement is unfounded and without right. Upon the foregoing facts the court states the following conclusions of law:

1. The law is with the defendant on the issues joined on plaintiffs' complaint.

2. The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

3. The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant, Fidelity Trust Company, Trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

4. The defendant and cross-complainant, Fidelity Trust Company, is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

5. The defendant and cross-complainant is entitled to judgment on account in the sum of $50,697.00 to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

6. The defendant and cross-complainant is entitled to recover its costs in this action taxed at $————

The court having found the facts specially and stated its conclusion of law thereon, now renders judgment accordingly.

It is therefore considered, ordered, adjudged and
13 decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant, Fidelity Trust Company, as such Trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen, (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of
14 White River.

Also that part of the northeast quarter of section thirteen (13) township, eighteen (18) north, range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods more or less, to White River thence southerly along said stream with the

meanderings thereof to be a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres more or less situated in Marion County, Indiana.

It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, Trustee, is entitled to judgment on this account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker, and William V. Rooker, by said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker, under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as Trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale,

conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

It is further considered, ordered adjudged and decreed that said Fidelity Trust Company as such Trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand ($18,000) Dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said Trustee shall, after giving said plaintiffs ninety (90) days notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-five Thousand ($65,000) Dollars; that if said
16 Hamilton County lands do not sell for said sum of Sixty-five Thousand ($65,000) Dollars, for lack of a bid for that sum, then said trustee, after ninety (90) days notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands, under this decree they do not fetch enough to pay the moneys and perform the obligation against said trust estate, in this action found to exist and to be due, then said trustee shall after giving thirty (30) days notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring using diligence to procure the

highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

1. To the payment of the costs of this action.

2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

5. The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her
17 heirs, executors, administrators and assigns.

From this judgment and decree appellants appeal and allege errors relied on for reversal as follows:

1. In overruling motions to strike out the appellee's second amended counter-claim.

2. In overruling the demurrers to the second amended counter-claim for insufficiency of facts.

3. In overruling motion to make second amended counter-claim more specific.

4 In overruling appellants' motion for judgment on the special findings.

5. The trial Court erred in its conclusions of law.

6. In overruling appellants' motion to modify the judgment.

7. In overruling appellants' motion for a new trial.

The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter-claim and cross-complaint of appellee. An examination of the record discloses that the pleading to which reference is here made was appellee's cross-complaint as amended after the decision of this court in the case of Rooker vs. Fidelity Trust Company, 185 Ind. 172.

The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court in this case and the exhibits attached to said cross-complaint no sufficient cross-complaint or counter-claim could have been written against appellants. This phase of the case need not be discussed in disposing of these motions for it is settled law that error can not be predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading.

Woodhams vs Jennings, 164 Ind. 555; Pfau vs. State ex rel. 148 Ind. 539.

In support of their second alleged error appellants claim that the appellee trust company could not in any event, by counter-claim sue the appellants on the subject matter of the trust estate on the facts set upon in the counter-claim for the reason that the counterclaim is not relevant or germane to the complaint.

The arguments presented by appellant in favor of their demurrers are in substance that the appellee was guilty of wrongful management of the trust property and sought to acquire title to it by wrong doing and that the trustee elected to repudiate the trust agreement and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost and it has no right to recover the sums of money expended by it for the use and benefit of the appellants.

A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor, of the defendant or which tend to reduce the plaintiff's claim or demand for damages.—Burns 1914, 355.

A counter-claim is good and germane to the principal case if it alleges matters connected with the subject of the original action.—Stanley vs. N. W. Ins. Co., 95 Ind. 254. Excelsior Clay Works vs. DeCamp, 40 Ind. App. 26.

A counter-claim under code provisions like ours is the equivalent of the cross bill in equity and in addition includes common law recoupment.—Woodruff vs. Garner 27 Ind. 4.

The purpose of a crossbill is to obtain full relief for all parties and a complete determination of all controversies which arise out of the matters charged in the original bill—10 R. C. L. p. 483.—261 et seq.

In this case the transaction having been brought into a court of equity by appellants it was not only the right of the court to entertain a crossbill which would settle all the rights of all the parties in all of their relations in the subject matter, but it was the duty of the court if neccessary, to require a cross bill to be filed which would enable it to completely
19 settle the controversy. See Sims vs. Burk, 109 Ind. 214.

A party who imagines he has two or more remedies or who misconceives his rights is not deprived of all remedy because he first tries a wrong one. Bunch vs. Graves 111 Ind. 351. Nave vs. Powell, 62 Ind. App. 274.

The doctrine of election of remedies is of equitable origin. It has no application to the circumstances of this case for to apply it here would work to the great harm and loss of the appellee trust company, and the unearned and undeserved large money benefits to appellants, moreover it does not apply unless in fact, two remedies are available, which is not true in this case, as the Supreme Court has decided in 185 Ind. 172. The court did not err in overruling the demurrers to the second amended counter-claim.

In support of their third alleged error the appellants argue at length that the counter-claim was illegal. The object of a motion to make a pleading more specific is to require the pleader to state with certainty what is vaguely stated in the pleading. Elliott's App. Proc. 665. Failey vs. Gribbling 128 Ind. 110.

The appellee, in its counter-claim set up very fully and in circumstantial detail the trust and its relation of it, and its title and doings as trustee, and the items of its account and the circumstances requiring the aid of the court in finally carrying out and closing the trust. There is no uncertainty or vagueness of statement and it is not claimed by appellants that there is. Their motion is based on what they call the illegality of the claim. The court did not err in overruling their motion to make more specific.

The court error relied on for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment on a special finding of facts is not recognized by our practice. It is elementary that the sufficiency of the evidence to sustain the finding is raised by a motion for a new trial and that questions of law raised by the conclusions of law stated on a finding can be presented only by exceptions taken to the conclusions of law. The court did not err in overruling appellants' motion for judgment on the special finding of facts.

It appears from the record that after the court filed its special finding of facts and conclusions of law thereon, the plaintiffs each respectively moved the court for judgment in their favor on the special finding of facts and when such motions were overruled they excepted to the conclusions of law. Under such circumstances the exceptions are not available.

Exceptions to conclusions of law upon facts specially found must be taken before the taking of any other step in the cause by the excepting party. Dickson et al vs. Rose 87 Ind. 103. See also Barner vs. Bayless 134 Ind. 600—Chicago R. R. vs. State ex rel 159 Ind. 237—Medical College vs. Commingore 140 Ind. 296...

Though it was taken on the same day that the ruling was made, an exception will not be available if it was not taken until after additional steps in the prosecution or defense of the case had been taken by the party reserving it. Ewbank's Manual (2d. Ed.) 24b.—Dickson vs. Rose 87 Ind. 103—Barner vs. Bayless 134 Ind. 600.

The correctness of the conclusions of law can not be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. Chicago S. E. Ry. Co. vs. State ex rel 159 Ind. 237. The judgment rendered in this case was in conformity with the conclusions of law.

The seventh error relied on for reversal by appellants is that the court erred in overruling their motion for a new trial. In support of their contention to show that the court erred in overruling said motion the appellants say that the cause was put at issue and tried on an unlawful cross-complaint;
21 and that therefore the judgment was contrary to law.

This contention was decided adversely to appellants in our ruling on the demurrers to the cross-complaint and counterclaim. The brief of appellants does not contain a condensed recital of the evidence in narrative form as required by the rules.

A statement of the evidence mixed with statements and arguments of counsel, propositions of law and citation of cases and which clearly does not purport to cover the entire evidence, does not comply with the rules of this court and does not command a consideration of a motion for a new trial involving the evidence. Rose vs. City of Jeffersonville, 185 Ind. 577 and cases there cited.

No question is presented on the sufficiency of the evidence. Judgment affirmed.

And afterwards, to-wit: On the 12th day of October, 1921, the Court being fully advised overruled the petition for rehearing heretofore filed herein by Appellant.

It is therefore considered by the Court that the judgment of the Court below in the above entitled cause, be in all things affirmed at the cost of the Appellant all of which is ordered to be certified to said Court.

And it is further considered by the Court, that the Appellee recover of the Appellant the sum of $48.05 for its costs and charges in this behalf expended.

THE STATE INDIANA
Supreme Court

I, Patrick J. Lynch, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said Court in the above entitled cause.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Court, at the City of Indianapolis this 13th day of October, 1921.

[SEAL] Patrick J. Lynch, C. S. C.

And afterwards to-wit, on the 16th day of November, 1921, the same being the 39th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had in said cause to-wit:

"Comes now the defendant in the above entitled cause and moves the court to redocket said cause, which motion is granted and said cause is now redocketed and said defendant now files therein its verified information and petition for an order to the plaintiffs therein, Dora E. Rooker and William V. Rooker, to appear in this court and before the judge thereof to show cause if any there be why they and each of them should not be punished for contempt of this court by violating the decree of injunction heretofore entered in said cause; and praying that said judgment and decree of this court heretofore entered in this cause be carried into effect; and praying for a writ of assistance to put defendant into possession of the real estate involved, which reads as follows: (Petition afterwards amended.)

"And the court does now order that said defendants be notified forthwith to be and appear in court at the Court House in the city of Noblesville, Indiana, on Monday, November 21, 1921, and then and there show cause why they shou d not be punished for contempt if any there be, and then and there to answer said information and verified petition."

And afterwards to-wit on the 21st day of November, 1921, the same being the 43rd Judicial Day, of the October Term,

1921, of said court the following further proceedings were had in said cause to-wit:

"Come now the plaintiffs and enter their special appearance and file a plea in abatement to the defendant's petition for a writ of assistance, which plea in abatement reads as follows:

State of Indiana } ss
County of Hamilton }

IN THE HAMILTON CIRCUIT COURT
OCTOBER TERM, 1921
No. 16338

Dora E. Rooker, Et Al
vs.
Fidelity Trust Company, Trustee

PLEA IN ABATEMENT

Dora E. Rooker and William V. Rooker, hereby enter
23 their special appearance to the "Petition for Writ of Assistance, etc." filed herein by the Fidelity Trust Company, Trustee, on the 16th day of November, 1921, for the sole purpose of pleading to the jurisdiction of this Court over the subject matter of said petition and over the persons of these respondents to said petition and for cause these respondents say:

1. That these respondents claim the right and privilege to take this cause direct from the Supreme Court of Indiana to the Supreme Court of the United States for review upon Writ of Error and upon Writ of Certiorari, or either of said writs because of certain questions arising upon the decision and judgment of the Supreme Court of Indiana involving the rights of these respondents under the constitution and laws of the United States, to-wit:

A. That the Indiana Practice Act of March 15, 1913, as amended and approved March 5, 1915, entitled "An Act Concerning Proceedings in Civil and Criminal Cases" impairs the obligation of contracts, and of the contract involved in this suit in contravention of Article One of the Constitution of the United States.

B. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit

Court in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

C. That the decision and judgment of the Supreme Court of Indiana in this cause denies to these responents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

D. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

E. That the decision and judgment of the Supreme
24 Court of Indiana takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

2. That these respondents claim their right and privilege to take said cause directly to the Supreme Court of the Un ted States without the intervention of this Court, pursuant of the judicial code as amended.

3. That heretofore on the 10th day of November, 1921, these respondents filed in the office of the Clerk of the Supreme Court of Indiana their praecipe in writing for a transcript of the record, proceedings and judgment of said Supreme Court, presenting as it does present, the said Federal question involved therein, as hereinbefore stated; that prior to the filing of said praecipe these respondents paid to the said Clerk as estimate of the cost of said record; that said Clerk of the Supreme Court of Indiana informs these respondents, and upon such information they state the fact to be that said transcript will be completed and ready for delivery to them within the next ten days.

4. That these respondents have written a brief for the purpose of presenting their petition to said Supreme Court of the United States, and to the Justices thereof, for a Writ of Certiorari and a Writ of Error, or either of said writs; that at the present time more than two hundred pages of said brief

are printed and said brief is ready for completion when respondents obtain the transcript of said record from the Clerk of the Supreme Court of Indiana, so that, from said transcript, these respondents may insert in said brief the proper page references to contents of said transcript.

5. That these respondents are pursuing with due diligence their effort to take said cause for review, as aforesaid, to the Supreme Court of the United States; and it is their purpose to perfect and accomplish their said endeavors and present said cause, as aforesaid, to the Supreme Court of the United States within the time required therefor by the laws of the United States.

6. That prior to the filing of this petition in this cause, these respondents orally informed said Fidelity Trust Company and its attorneys that this cause was to be presented for review as aforesaid to the Supreme Court of the United States; that thereafter and prior to the filing of this petition for a Writ of Assistance, as these respondents are informed and believe, and upon information and belief they state the fact to be, that Charles E. Cox, one of the attorneys for the Fidelity Trust Company in this cause, went to the office of the Clerk of the Supreme Court of Indiana and made an examination of the record and made notation of the entries in this cause and of the said praecipe of these respondents for this record.

WHEREFORE, these respondents say that this Court is without jurisdiction in the premises and they demand judgment that this proceeding abate, and they pray for all proper relief.

Christian & Waltz,
W. V. Rooker,

Attys for Dora E. Rooker and William V. Rooker.

Dora E. Rooker and William V. Rooker, being first duly sworn, say that they are the respondents in the matter above entitled, and as such they make this affidavit and say that the foregoing plea is true, as therein averred.

Dora E. Rooker.
William V. Rooker.

Subscribed in my presence and sworn to before me, this 21st day of November, 1921.

Witness my hand and official seal.

Maude I. Dale,
Notary Public.

My Com. Expires Oct. 10, 1922.

And afterwards to-wit on the 25th day of November, 1921, the same being the 47th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had in said cause to-wit:

Come now the parties and defendant files a demurrer
26 to plaintiffs plea in abatement which demurrer reads as follows:

State of Indiana)
Hamilton County) ss

IN THE HAMILTON CIRCUIT COURT
OCTOBER TERM, 1921

Dora E. Rooker, et al vs Fidelity Trust Company Trustee	No. 16338 DEMURRER TO PLAINTIFF'S PLEA IN ABATEMENT TO DEFENDANT'S PETITION FOR WRIT OF ASSISTANCE, ETC.

The defendant in the above entitled cause demurs to plaintiff's plea in abatement to defendant's petition for writ of assistance, etc., therein and for cause of demurrer says that said plea in abatement does not state sufficient facts to abate such petition.

Chas. E. Cox,
Henry Seyfried,
Attorneys for Defendant.

MEMORANDUM

1. In so far as the petition is an information of a contempt by the violation of the injunction decree, the plea in abatement addresses no averments to it, and hence, it can not be abated on this plea. The plea being addressed to the pleading as an

entirety it is of course, therefore subject to demurrer for want of facts.

2. But if the plea did contain averments directed to the petition as an information, and if it was conceded that a plea in abatement would lie to such an information, nevertheless the plea is bad for the rule is that an appeal, even with a supersedeas, does not annul an order of injunction, and a party who disobeys the order by an act done after the appeal may be punished for contempt.

3. In no case does an appeal without a bond stay execution of any sort on the judgment or decree appealed from. No bond was ever given in the appeal from the judgment and decree in this case nor does it appear from the averments of the
27 plea in abatement that it is purposed to give one in the proposed appeal to the Supreme Court of the United States.

4. The only effect of an appeal to a court of error is to stay execution on the judgment from which it was taken. In all other respects, the judgment, until it is annulled or reversed stands binding on the parties, as to every question decided. The judgment may be sued on though appealed, and of course can be carried into effect.

5. There is nothing more averred here in the plea than an intention and certain preliminary steps towards appealing from the Supreme Court of Indiana to the Supreme Court of the United States. Such averments can not serve to abate the petition of defendant.

6. It is not averred in the plea that the plaintiffs intend to apply for a supersedeas. It is not and can not be shown that they can procure a supersedeas. Hence the plea is not sufficient to abate the petition.

7. As a plea in abatement it lacks that high degree of certainty and particularity of averments of facts required by the law for such pleas which are not favored and against which all intendments are taken.

Chas. E. Cox,
Henry Seyfried,
Attorneys for defendant.

Said demurrer is now sustained by the court to which ruling the plaintiffs except. And plaintiffs are now ruled to answer or demur to the petition for writ of assistance not later Nov. 28th, 1921."

And afterwards to-wit on the 28th day of November, 1921, the same being the 49th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had in said cause to-wit:

"Come now the parties and the plaintiff files separate and several motions to separate the causes of action, contained in the application for citation and writ of assistance which separate motions read as follows:

28 State of Indiana)
County of Hamilton) ss

IN THE HAMILTON CIRCUIT COURT,
OCTOBER TERM, 1921.

Dora E. Rooker, et al
vs.
Fidelity Trust Company
} MOTION TO SEPARATE

Dora E. Rooker, and William V. Rooker move the court to require the defendant to separate its petition into paragraphs and number them in such manner as to state separately:

(1) The facts and the relief sought in respect of the application for a writ of assistance.

(2) To state separately the facts and the relief sought in respect of the proceedings in contempt.

F. G. Christian,
W. V. Rooker,
Attorneys for Plaintiffs.

Each of said motions is now sustained by the court to which each of said motions the defendant excepts.

And the defendant asks leave of court to amend its petition by striking out that part of the petition asking for a citation for contempt. Leave is now granted and said petition is now

amended by striking out that part asking for citation for contempt, which petition so amended reads as follows:

State of Indiana)
29 County of Marion) ss

IN THE HAMILTON CIRCUIT COURT,
OCTOBER TERM, 1921.

Dora E. Rooker, et al. Plaintiffs vs. Fidelity Trust Company, Trustee Defendant	No. 16338 PETITION FOR WRIT OF ASSISTANCE, ETC.

The Fidelity Trust Company, Trustee, defendant and cross-complainant in the above entitled cause, respectfully shows to the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiffs' complaint and upon defendant's counter-claim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counter-claim and cross-complaint; that this court, on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee then held the legal title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

All of the west half of the north half of section eighteen (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres, more or less.

Also the southwest quarter of section seven (7), town-
30 ship eighteen (18) north, range five (5) east, lying west

of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

Also, the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods, more or less, to White River, thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres more or less, situated in Hamilton County, Indiana.

And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less, situated in Marion County, Indiana.

It was, in said judgment and decree, further adjudged and decreed that this defendant was then and there entitled to judgment on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

It was further in said judgment and decree adjudged and decreed that said plaintiffs had then parted with all their title to said real estate, and the appurtenances thereunto belonging, and the right to the possession thereof and the use rents and profits thereof, and that they then had no interest therein other than an interest in the proceeds of the sale of said real estate contingent wholly upon a sale thereof at such a price that, after the payment or costs, liens, said judgment on account for $50,697 and the further reimbursement of said

defendant trustee of such sum or sums as might accrue to it in the execution of said trust an unappropriated sum might still remain in defendant's hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds, aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and ob-
31 structive of the completion of the execution of said trust by said defendant and that said plaintiffs were then and there and thereby, each and both perpetually injoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give possession and from in any manner interfering with disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands.

It is further, in said judgment and decree, ordered adjudged and decreed that said defendant, trustee should proceed, under the terms of the deeds and trust agreement under which it held title, to sell said lands and to proceed and first make sale of said Marion County lands and later to make sale of said Hamilton County lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or disapproval.

Said judgment and decree further directed the application of the proceeds of such sales.

And defendant further avers, that at the conclusion of the hearing and trial of said cause and before the finding and judgment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered by the agreement of the parties to said action, plaintiffs and defendant, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton County lands and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn, and to collect the proceeds and apply and distribute

the same under the direction of the court; that said trust company did appear in open court on said day and did accept said trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from said trust.

And defendant further avers that said plaintiffs filed in the Supreme Court of Indiana a vacation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issue staying execution on said judgment and that the same has been and remained in full force and effect and is now, that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and that thereafter plaintiffs filed a petition for a rehearing thereof which was on October 1 , 1921, in all things overruled and said judgment became absolutely final.

And plaintiff further avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure a purchaser and to sell said Marion County real estate; that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, of Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court that such exceptions and objections were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay or proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained and is now in full force and effect; that defendant did, pursuant to said order execute its deed by delivering to said Triangle Company and received the consideration of said sale, to-wit, the sum of $16,000.

And defendant further avers that notwithstanding the afore-

said judgment and decree of December 21, 1918, said
33 plaintiffs, Dora E. Rooker and William V. Rooker,
have at all times since claimed to be the owners of said real estate and entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendant; that without right and without the knowledge of this defendant and without the knowledge or approval of the court, said plaintiff procured said Wainwright Trust Company, receiver as aforesaid to make leases to one West for the crop, years 1919 and 1920, of the tillable parts of said Hamilton County lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amount and value of which are at this time unknown to defendant, and did deliver one-half thereof to said Dora E. Rooker and said William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that said plaintiffs unlawfully and in violation of the decree of this court, converted said crops to their own use; that in the year 1920, said plaintiffs without the knowledge of defendant or this court took the rental of said Hamilton County lands out of the hands of this courts receiver, said Wainwright Trust Company, and themselves rented the same to one Thomas West for a grain rent for the crop year 1921 providing therein that he should deliver the landlord's share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one-half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921, produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlord's share thereof fifty tons of the value of $600.00 which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3,000 bushels of corn of the net value of $1,000 of which plaintiffs are claiming one-half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threat-
ening said West with legal action if he does not comply
34 with such demand and are seeking by threats and

intimidation to prevent him from gathering his share of said corn if he does not so comply.

And defendant further avers that at the time of the sale of said Marion County land in 1919 as aforesaid there was then on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlord's share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it of all of which said tenant was then and there informed by defendant; that said plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's share of said crops, and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant, and to hold possession thereof as such and to deliver to them the landlord's share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of 1921, continued to do; that in the years 1919, 1920 and 1921, said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of , 1921, said purchaser received possession of said lands and put
35 its own tenant in possession thereof whereupon, on the day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant, was a trespasser on said premises

and that he, Rooker, was the owner thereof with the right to the possession and use thereof.

And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held possession of the dwellings and other appurtenances of said Hamilton County lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against said lands, including taxes, insurance, etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiffs' conduct and the depreciation of said property it can not now be sold at a price which will pay the costs and expenses and reimburse it fully for its outlay and interest.

And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton County lands and appurtenances which demand was refused by them and they and each of them refused to comply therewith.

36 And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn in to the case, or involved in it or decided either by the Circuit Court of Hamilton County or the Supreme Court of Indiana; that said proposed appeal is for the sole purpose of attempting

to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

And defendant avers that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

Wherefore defendant prays the court that said cause be redocketed and that this court's former judgment and decree may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurtenances and by putting defendant into possession thereof; and that a writ of assistance be awarded to defendant to put it in possession of said lands and appurtenances and to oust said plaintiffs, their agents, servants and all acting for and claiming under them.

And defendant prays for all proper relief in the remispes which a court of equity may accord.

Charles E. Cox,
Henry Seyfried,
Attorneys for Defendant,
Fidelity Trust Company, Trustee.

State of Indiana, Marion County ss:

I, William M. Fogarty, being duly sworn, on oath do say, that I am the President of The Fidelity Trust Company of Indianapolis, Indiana; that said trust company as trustee is the defendant in the above entitled cause of action and that the matters and facts averred in the above and foregoing petition are true in substance and in fact as I am informed and believe.

William M. Fogarty

Subscribed and sworn to before me, this 15th day of November, 1921.

My commission expires Oct. 6, 1925.

James E. Rocap,
Notary Public.

[SEAL]

37 The plaintiffs separately and severally file demurrer to the application for writ of assistance, which demurrer reads as follows:

State of Indiana)
County of Hamilton) ss

IN THE HAMILTON CIRCUIT COURT
OCTOBER TERM, 1921

Dora E. Rooker et al vs. Fidelity Trust Company, Trustee	No. 16338 DEMURRER TO THE PETITION

Dora E. Rooker and William V. Rooker demur to the petition of the Defendant, Trustee, as amended and for their demurrer plaintiffs say:

38 1. That there is a defect of parties plaintiff in said petition in this, to-wit: That upon the proceedings and judgment recited in said petition and the record of this court pertaining thereto, it is apparent that said judgment is the joint judgment of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company, in its corporate capacity proper, is not a co-petitioner in said petition nor is it made a defendant to answer thereto nor in any wise required to assert its interest in the premises, nor is there any showing in said petition that said interest of the Fidelity Trust Company in its corporate capacity proper has been transferred to and is held by the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company in its corporate capacity proper should be joined as a co-petitioner in said petition or it should be named as a defendant thereto and the reasons shown why said Fidelity Trust Company in its corporate capacity proper fails to join in said petition.

2. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that the Wainwright Trust Company is receiver of the lands in controversy situate in Hamilton County in the State of Indiana; that said receiver is

a necessary and proper person to these proceedings and said petition should require the Wainwright Trust Company to appear and answer as to its interest in the premises.

3. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that Thomas West is tenant of the lands in controversy situate in Hamilton County in the State of Indiana; that said tenant is a necessary and proper person to these proceedings and said petition should require the said Thomas West to appear and answer as to his interests in the premises.

4. That there is a defect of parties defendant in said petition apparent upon the face of the record in this to-wit:
39 That it is named in said petition that James L. Wheatley is tenant of the lands in controversy situate in Marion County in the State of Indiana; that said tenant is a necessary and proper person to these proceedings and said petition should require the said James L. Wheatley to appear and answer as to his interests in the premises.

5. That said petition does not state facts sufficient to constitute a cause of action as a petition for a writ of assistance.

6. That said petition as amended is not verified.

MEMORANDUM

For their memorandum with their demurrer in respect of the insufficiency of said petition to state a cause of action, these plaintiffs say:

1. That the judgment sued on is a joint judgment and cannot be enforced singly.

2. That the Fidelity Trust Company, Trustee, is not the real party in interest.

3. That it is not shown that the Fidelity Trust Company in its corporate capacity proper withholds its consent from this proceedings.

4. That the writ of assistance is not a primary writ but is issued only in aid of a prior process of court and that no such process has been issued out of this court on this judgment.

5. That no execution ever has been issued on the judgment and decree of court mentioned in said petition.

Respectfully submitted

F. G. Christian,
W. V. Rooker,
Attorneys for Plaintiff.

Said demurrers are overruled by the court to which of each separate rulings the plaintiffs separately except. The Plaintiffs now file an answer to the petition, for writ of assistance which answer reads as follows:

40 Dora E. Rooker, et al
vs.
Fidelity Trust Company, Trustee

No. 16338
ANSWER TO THE PETITION FOR WRIT OF ASSISTANCE.

Dora E. Rooker and William V. Rooker, plaintiffs in the cause above entitled, for their answer to the petition for a writ of assistance say, that they deny each and every allegation therein contained.

F. G. Christian.
W. V. Rooker.

And afterwards to-wit on the 8th day of December, 1921, the same being the 58th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had to-wit:

"Come now the plaintiffs and file a second paragraph of answer to the petition for writ of assistance, which second paragraph of answer reads as follows:

State of Indiana } ss
Hamilton County }

IN THE HAMILTON CIRCUIT COURT
AT THE OCTOBER TERM, A. D. 1921

Dora E. Rooker, et al
vs
Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker

No. 16338

SECOND PARAGRAPH OF ANSWER

2. Dora E. Rooker and William V. Rooker, plaintiffs in the cause above entitled, but who are made defendants to the information and petition, filed under in said cause by the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, for their further defense to said information and petition say: That this Honorable Court, should not proceed further in this cause for that on to-wit, the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the clerk of the Supreme Court of the United States and caused to be docketed as an action pending in said court their petition for a writ of certiorari to be issued out of said court to the Supreme Court of Indiana, to bring to said
41 Supreme Court of the United States a transcript of the record proceedings and judgment of the Supreme Court of Indiana in Cause No. 23,598 in said court wherein the said Dora E. Rooker and William V. Rooker are appellants and the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker are appellees; that said Cause No. 23,598 in the Supreme Court of Indiana is the same cause on appeal as No. 16,338 in this court and the judgment sought to be revised and corrected on said writ of certiorari is the same judgment and none other, upon which in this proceeding the said Fidelity Trust Company relies; that there are presented in said petition for a writ of certiorari certain Federal questions in the form and manner following, to-wit:

"THE FIRST FEDERAL QUESTION

1. The Indiana Civil Practice Act of March 15, 1913 as amended and approved March 5, 1915, is a state law impairing the obligation of contracts, and is in contravention of Article 1, Section 10, of the Constitution of the United States. The evil of this act reposes in the fact that it admits the substitution of "conclusions" in the place of facts in pleadings, evidence, verdicts and judgments of courts. The effect of the statute is that contracts can be declared upon as meaning what they do not mean and thereby that causes can be tried upon false issue, to the injury of litigants.

The second amended counter claim and as supplemented pleads conclusions in contravention of the facts and proceeds upon the theory:

FIRST: That by their deeds and trust agreement these petitioners parted with all their interest in the trust estate, together with the right of possession and the ownership of the rents and profits, accepting as true the pleaders' conclusions in the second amended counter-claim, and as supplemented the trial court adopted the theory that these petitioners by their deeds and trust agreement, having parted with all their interest in the trust estate, together with the right of
42 possession and the ownership of the rents and profits, were not competent to present any issue affecting the misfeasance or malfeasance of the trustee, to which the trustee was bound to respond, and to effectuate this theory the trial court held and decided adversely to these petitioners every question they raised, including:

a. It denied the various motions to strike out the second amended counter claim.

b. It denied the various motions to make more specific the second amended counter claim.

c. It overruled the various demurrers to the second amended counter claim and as supplemented.

d. It overruled every objection made by these petitioners at the trial of the cause, to the introduction of various matters in evidence.

e. It made a special finding of facts in which it denied that these petitioners had any interest in the trust estate or in its administration.

f. It denied the motion of these petitioners for judgment on the special findings.

g. It stated conclusions of law adverse to the claims of these petitioners that as *cestuis que trust* they had a competent interest in the trust estate which entitled them to complain of its repudiation by the trustee, of the trustee's renunciation of the duties; of the acts of misfeasance and malfeasance of the trustee in the administration of its office.

h. It rendered judgment upon the complaint and upon the counter claim adverse to the claim of these petitioners that as *cestuis que trust* they had a competent interest in the trust estate which entitled them to complain of its repudiation by the trustee, of the trustee's renunciation of its duties, of the acts of misfeasance and malfeasance of the trustee in the administration of its office.

i. It entered its injunction against these petitioners prohibiting them forever from asserting any claims, interest
43 or right in respect of the trust estate and its administration, and held that their sole interest and right was to receive from the trustee any residue which the trustee should turn over to them at the end.

j. It denied that the act of repudiation of October 28, 1912, had any potency to impeach the trustee upon the complaint of these petitioners.

k. It denied that the original cross complaint of the Fidelity Trust Company, declaring upon the trust deed as a mortgage had any potency to impeach the trustee upon the complaint of these petitioners.

l. It denied that the sheriff's sales of all the real estate of the trust estate, made upon the order and direction of the Fidelity Trust Company in execution of its judgment rendered upon the foreclosure of the trust deed as a mortgage had any potency to impeach the trustee on the complaint of these petitioners.

m. It denied every question raised in this case and many which were not raised in it, in such manner as to exclude and foreclose any and every claim, interest and right of these petitioners in and to the trust estate during the term of its administration.

SECOND: Accepting as true the pleader's conclusions in the second amended counter claim and as supplemented, that the claim therein described was a debt in fact and in law, the trial court held that said debt was matured so that it could go to judgment, and this notwithstanding the total absence of a time limitation upon which the debt might mature, and in the absence of a time limitation of any stated contract to pay,

notwithstanding the absence also of any misconduct or default on the part of these petitioners by which the maturity of said debt was advanced or fixed, and in the absence of both a time limitation and of any misconduct or default on the part of these petitioners, notwithstanding the absence also of any issue tendered by the trustee that it had been delinquent
44 but that it had done acts and deeds beneficial to the trust estate and accepted by it which exceeded in value the wrongs done by the trustee to the trust estate in its maladministration. And having adopted this theory of the maturity of debt the court made rulings which included the following:

a. It denied the various motions to strike out the second amended counter claim.

b. It denied the various motions to make more specific the second amended counter claim.

c. It overruled the various demurrers to the second amended counter claim and as supplemented.

d. It overruled every objection made by these petitioners at the trial of the cause to the introduction of various matters in evidence.

e. It made a special finding of facts in which it found that the debt was matured and these findings were adverse to the pleadings and the evidence.

f. It denied the motion of these petitioners for judgment on the special findings.

g. It stated conclusions of law adverse to the showing made upon the pleadings and proof that said claim was not a debt matured.

h. It overruled petitioners' exceptions to the conclusions of law.

i. It rendered judgment adverse to the facts as shown upon the pleadings and proof, and adjudged said claim to be a debt matured and competent to enter into judgment.

j. It overruled the motions of these petitioners for new trial.

k. It fixed the penalty of the appeal bond at the excessive sum of $65,000.00 in order to prevent an appellate review of said judgment.

THIRD: Accepting as true the pleader's conclusions in the second amended counter claim as supplemented, that the counter claimants therein had well and duly performed all
45 the conditions on their part to be performed, and this notwithstanding said pleadings showed upon their face that said averment was sham and false, the court made rulings which included the following:

a. It denied the various motions to strike out the second amended counter claim.

b. It denied the various motions to make more specific the second amended counter claim.

c. It overruled every objection made by these petitioners at the trial of the case to the introduction of various matters in evidence.

e. It denied all probative effect of the act of repudiation of October 28, 1912.

f. It denied all probative effect of the pleadings upon which issue was joined at the first trial of this cause.

g. It denied all probative effect of the first judgment in this cause.

h. It denied all probative effect of the sheriff's deed of June 8, 1915, whereby the Marion County lands of the trust estate were conveyed upon its own execution sale to the Fidelity Trust Company.

i. It denied all probative effect of the sheriff's deed of September 28, 1915, whereby the Hamilton County lands of the trust estate were conveyed upon its own execution sale to the Fidelity Trust Company.

j. It made a special finding of facts, in which it denied the probative effect of uncontroverted evidence of the trustee's misfeasance and malfeasance in office from October 28, 1912, to the date of said finding.

k. It made a special finding of facts, in which it denied the probative effect of the opinion and judgment of the Supreme Court on the first appeal of this case

l. It denied the motions of these petitioners for judgment on the special findings.

m. It stated conclusions of law adverse to the pleadings, the proof and the special findings.

46 n. It fixed the penalty of the appeal bond at the excessive sum of $65,000.00 in order to prevent an appellate review of the record, proceedings and judgment of the trial court.

o. It rendered judgment adverse to the pleadings, the proof and the special findings.

THE SECOND FEDERAL QUESTION

2. The judgment of the Hamilton Circuit Court of Indiana deprives these petitioners of their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. This quality of the court's judgment traces to the Practice Act of March 15, 1913, as amended and approved March 5, 1915, which not only impairs the obligation of the contract, but has the further vice that it strikes down the precedents in procedure and allows the court to act arbitrarily and without the essentials of jurisdiction, and to hear and determine cases upon false issues.

First. The judgment of the Hamilton Circuit Court wrongfully and unlawfully denied to these petitioners, and each of them, the remedies for the enforcement and protection of their rights, which existed at law at the time said contract was made and which entered into and became a part of the consideration of said contract and were its obligation, to-wit:

a. That fictions in pleadings were abolished in Indiana and that suits and actions could be instituted, maintained and defended only by the real parties in interest.

b. That in all suits and actions recovery must be had *secundum allegata et probata* or not at all.

c. That the terms of a written instrument could not be varied with parol evidence.

d. That where a written instrument entered into and became a part of any pleading, proof, finding, verdict or judgment of the court, the terms of said instrument prevailed over any conclusion to the contrary in said pleading, proof, finding, verdict or judgment.

e. That the *cestui que trust* was the equitable owner of the trust estate and because of such interest could maintain suits and actions for the protection and benefit of the trust,
47 as against a delinquent trustee.

f. That repudiation of a trust contract by the trustee was an actionable wrong for which *cestui que trust* could bring and maintain his suit or suits against the delinquent trustee.

g. That where repudiation occurred by the trustee the *cestui que trust* could sue to defend and conserve the trust property.

h. That where repudiation of a trust by the trustee occurred and action was thereupon begun against the trustee by the adversary parties in interest, there could be no reinstatement of the trust other than a conventional reinstatement, and this required the making of a new contract by and between the parties in interest, the reinstatement in every such instance being contractual.

i. That it was within the province of the courts to enforce contracts, but not to make them.

k. That where an act of repudiation was accomplished by a trustee, thereupon the trustee waived, surrendered and abandoned his rights under the contract, except that he became, as against the trust estate, a creditor as on a general account for any benefits received by the trust estate in excess of damages sustained because of the trustee's delinquency.

l. That where one had been a trustee became by his own misconduct a mere general creditor of the trust estate, then he had no such interest thereafter in the trust estate as would protect him in making any further payments or advancements of money to the credit of the trust, but all such subsequent payments and advancements were and would be held to be voluntary and not actionable.

m. That a complaint, and the proof to sustain it, and the verdict or findings of the court thereon, should be good as to all who joined therein or it would be bad as to all.

n. That it was an act of repudiation of the trust for
48 a trustee to join with a creditor in a suit against the trust estate.

o. That a trust estate was entitled to have its day in court and that no judgment could be rendered against it unless it was represented in the case by some person qualified competent and having an interest.

p. That the denial to the trust estate of the remedies in its behalf which existed at the time the trust contract was made and which entered into the consideration thereof and become its obligation, are stated in the particular rulings specified under "The First Federal Question" *supra*, to which reference is hereby made for greater certainty.

THE THIRD FEDERAL QUESTION

3. The judgment of the Supreme Court of Indiana deprives these petitioners of their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States. This quality of the court's judgment traces not only to vices of the Practice Act of March 15, 1913, as amended March 5, 1915, as stated in Points 1 and 2 *supra*, but the judgment of the Supreme Court has the additional vice that it was made *coram non judice* by the disqualification of the court, one of the members of which, Judge Louis B. Ewbank, who had a large and vital interest and duty, both personal and fiduciary, in the precedents to be established by this case, and these interests and duties of Judge Ewbank were hostile to and in derogation of the rights of these petitioners in this case. These disqualifying interests and duties of Ewbank, and the method of their disclosure to petitioners, are recited in the assignment of errors as it relates to the ruling on the petition for a rehearing.

4. The judgment of the Hamilton Circuit Court of Indiana denies to these petitioners the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States *quoad hoc;* the court holds that these petitioners because of their trust deed, creating
49 the trust and lodging the legal title of the property in the trustee for the purposes of the trust, thereby parted with all their interest in the affected property, and therefore have no standing in court to protect their trust estate as against the misfeasance and malfeasance of the malevolent

trustee, who had repudiated the trust and announced its obligations thereunder. The petitioners contend that the *cestuis que trust* are the equitable owners of the affected property that this interest of the *cestuis que trust* continues until the final determination of the trust and that where the trust agreement calls for performance *in pais* to determine the trust that judicial determination thereof cannot be substituted for that which the parties agreed upon as the consideration for and obligation of their contract.

First. The fourth federal question arises upon the record in the same manner as the first and second federal questions arise, and as to statement of the *supra* reference is hereby made for greater certainty.

THE FIFTH FEDERAL QUESTION

5. The judgment of the Supreme Court of Indiana denies to these petitioners the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States. The merit of this point and its determination involves collectively those issues and matters which are severally stated in Points 1, 2, 3, and 4 *supra*.

THE SIXTH FEDERAL QUESTION

6. The judgment of the Supreme Court of Indiana denies to these petitioners due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States, in holding that these petitioners should be denied the remedies and processes of the law because to apply them in behalf of petitioners would work to the great harm and loss of appellee trust company, and to the unearned and undeserved large money benefits to appellants.

First. The sixth federal question arises upon the face of the opinion of the Supreme Court as it assumes to state
50 and to interpret the record, and includes the following points, namely:

a. The Supreme Court erred in holding that the rescission of the act of repudiation of the trust, made by the trustee, was not a contractual right of the parties, but was a mere matter of judicial remedy. The application of this doctrine of rescission

controls the right to make contracts and by substituting for that right the judicial power to create a contractual status for these petitioners, the court denies to these petitioners the equal protection of the laws. It imposes upon them a conventional status without their consent. Rescission is a contractual right and not a judicial remedy in the first instance.

b. The Supreme Court erred in holding that the election of remedies was a doctrine which applied only where there were in fact two remedies available, and that these petitioners waived their exceptions to the conclusions of law by moving for judgment on the special findings, although there was in fact no such remedy known to the law as a motion for judgment on the special findings. The Supreme Court refused to consider the motion for judgment on the special findings because there was no such remedy known to the practice, and thereupon refused to consider the exceptions to the conclusions of law because the petitioners had sought the countervailing remedy of a motion for judgment. This ruling withholds from the petitioners remedial rights upon the same terms which it grants them to respondents and all in respect of matters vital in the case. This is the denial of the equal protection of the laws.

c. The Supreme Court erred in holding that the only remedy the respondents and was to sue upon the contract as "fully and duly performed." This is an erroneous statement of the law, and as a recital of the record it is false in fact. It is one of those erroneous "conclusions" which the Practice Act of March 15, 1913, as amended and approved March 5, 1915, assumes to qualify the courts to put forth in the place and stead of the facts and of the truth. In the prayer of the amended complaint, these petitioners ask that any sum they may be found to owe the respondents be ascertained and that an exact time be fixed for its payment, and that a receiver
51 be appointed to proceed with the execution of the trust.

Again in their motions to strike out the second amended counter claim, in their motions to make that pleading more specific and in their demurrers thereto, the petitioners distinctly pointed out that three forms of action were available; namely, (1) action on the contract as having been completely per-

formed, (2) action on the contract as having been broken by these petitioners and recovery by the respondents on the *quantum meruit*, employing the contract to fix the measure of damages, (3) action on the contract as having been breached by the respondents, but with the averment that while acting under the contract, respondents had done acts and expended money in excess of the damages suffered by the trust estate because of respondents' breach of the trust contract. The rule that recovery must be had *secundum allegata et probata* was material in choosing the truthful one of these three remedies. The trial record in rulings on evidence, the special findings, the conclusions of law and the judgment all impeach, rather than sustain, the theory and averments of the second amended counter claim, to the effect that the counter claimants had duly and lawfully performed all the conditions to be by them performed. Denying to petitioners the benefit of these rules of remedial procedure was a denial to petitioners of the equal protection of the law, and the denial was unspeakable when the Supreme Court, as it did do, based the denial on the ground that the application of the rule "here would work to the great harm and loss of the appellee trust company."

And the said Dora E. Rooker and William V. Rooker now here aver that each and all said federal questions are involved in the present record of this court in this cause at this time.

That along with their said petition for a writ of certiorari so filed in the office of the Clerk of the Supreme Court of the United States the said Dora E. Rooker and William V. Rooker filed thirty copies of their brief on said petition and they caused said petition to be noted for submission to the
52 court Tuesday the 3rd day of January, 1922, when the court convenes or as soon thereafter as counsel can be heard; that thereafter they served on the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, notice of said motion to submit and delivered to them a copy of said petition for writ of certiorari and brief thereon and they thereafter transmitted said notice of motion and proof of service thereof to the Supreme Court of the United States and caused the same to be noted on the docket of said court where

said cause is now pending; that upon the facts in the premises the jurisdiction of this cause is now wholly and exclusively in the Supreme Court of the United States and this court should proceed no further.

Wherefore these plaintiffs and cross defendants demand judgment.

Christian & Waltz,
W. V. Rooker,
Attorneys for Plaintiff and
Cross-defendants.

And afterwards to-wit on the 9th day of December, 1921, the same being the 59th Judicial Day, of the October Term, 1921, of said court the following further proceedings were had in said cause to-wit:

"Comes now the defendant and files motion to strike out plaintiffs' second paragraph of answer to the petition for a writ of assistance, which motion reads as follows:

State of Indiana }
County of Hamilton } ss

IN THE HAMILTON CIRCUIT COURT
OCTOBER TERM, 1921

Dora E. Rooker, et al
vs.
Fidelity Trust Company, Trustee } No. 16338

MOTION TO STRIKE OUT
PLAINTIFFS' SECOND PARAGRAPH OF ANSWER
TO DEFENDANT'S PETITION

The defendant in said cause moves the Court to reject
53 and strike from the files of the cause the second paragraph of plaintiffs' answer to defendant's writ of assistance herein, for the reason that said paragraph of answer avers facts in the nature of abatement and not in bar of said petition.

Charles E. Cox,
Henry Seyfried,
Attorneys for Defendant.

And afterwards to-wit on the 10th day of January, 1922, the same being the 2nd Judicial Day, of the January Term, 1922, the following further proceedings were had in said cause to-wit:

"Come now the parties and plaintiffs ask leave of court to withdraw their answer to defendant's petition for writ of assistance and to file an additional answer. Leave is now granted by the court and said answer as heretofore filed is now withdrawn and plaintiffs file an additional answer in the following words and figures to-wit:

State of Indiana)
Hamilton County) ss

IN THE HAMILTON CIRCUIT COURT

Dora E. Rooker, et al
vs.
Fidelity Trust Company, et al
No. 16338
Complaint

Cross Petition of
Fidelity Trust Company as Trustee, etc.
vs
Dora E. Rooker, et al
Cross-Petition

2. Dora E. Rooker and William V. Rooker, defendants to the cross petition herein of the Fidelity Trust Company as trustee of the estate of Dora E. Rooker for their second and further plea to the jurisdiction of this court in the matter of the cross petition of the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, say:

That the court should proceed no further in this matter for the reason that the jurisdiction of the subject matter of this cause and of the parties thereto is exclusively in
54 the Supreme Court of the United States upon the facts following, to-wit:

1. On the 12th day of October, 1921, this cause was pending in the Supreme Court of Indiana on appeal from the judgment of this court in the controversy herein and on said day said Supreme Court overruled said petition for rehearing.

7
3

2. On the 14th day of December, 1921, these defendants to said cross petition and plaintiffs in said principal case, and appellants in said cause in the Supreme Court of Indiana, filed in the office of the Clerk of the Supreme Court of Indiana their petition for a writ of error to the Supreme Court of the United States in said cause and they filed at the same time and in the same place their assignment of errors; that thereupon said petition for a writ of error was presented to the Chief Justice of the Supreme Court of Indiana who allowed the same and fixed the appeal bond at the penal sum of one thousand dollars conditioned as provided by law for the payment of all damages and costs and approved the New Amsterdam Casualty Company of New York as surety on said bond; that thereupon said bond so fixed and conditioned was approved by the Chief Justice of the Supreme Court of Indiana and filed in said cause in the office of the clerk of said Supreme Court.

3. On the 15th day of December, 1921, the writ of error of the Supreme Court of the United States issued in the name of the President, bearing teste of Noble C. Butler, Clerk of the District Court of the United States and the seal of said court, was filed by these defendants in said cause in the office of the Clerk of the Supreme Court of Indiana.

4. On the 17th day of December, 1921, these defendants as appellants in said cause in the Supreme Court of Indiana and as plaintiffs in error in said cause in the Supreme Court of the United States, filed in the office of the clerk of the Supreme Court of Indiana, their citation to the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust
55 Company as trustee of the estate of Dora E. Rooker, commanding their presence as required by law in said cause in the Supreme Court of United States, and together with said citation these defendants filed with said citation in the office of the Clerk of the Supreme Court of Indiana the acknowledgment of service thereof on said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as said trustee.

5. That on the 19th day of December, 1921, these defendants, as said appellants in the Supreme Court of Indiana and as said plaintiffs in error in said cause in the Supreme Court of

the United States lodged for said defendants in error a copy of said writ of error in the office of the clerk of the Supreme Court of Indiana.

6. That on the 22nd day of December, 1921, these defendants as said plaintiffs in error in said cause in the Supreme Court of the United States filed their praecipe in the office of the Clerk of the Supreme Court of Indiana for a transcript of the record proceedings and judgment of the Supreme Court of Indiana in said cause, and with said praecipe they filed the acknowledgment of service thereof on said defendants in error.

7. That these defendants are informed and believe that the clerk of the Supreme Court has at this time practically completed said transcript and he informs them, and upon information they state the fact to be, that said clerk will have said transcript in the office of the clerk of the Supreme Court of the United States, all within the manner and time provided by law.

Wherefore these defendants pray judgment that this court proceed no further and that they be discharged hence with their costs and they pray for all proper relief.

Christian & Waltz,
W. V. Rooker,
Attorneys for Defendants.

William V. Rooker being first duly sworn upon his oath says that he is one of the defendants in the matters above entitled on said cross petition; that the facts in the premises lie particularly within the knowledge of this affiant and not of
56 his co-defendant; that for himself and his co-defendant he makes this affidavit and says that the facts stated in the foregoing answer and plea are true and further affiant saith not.

William V. Rooker.

Subscribed in my presence and sworn to before me this day of January, 1922.

Witness my hand and official seal. My commission expires

J. D. Hill,
Clerk of the Hamilton C. C.

And afterwards to-wit on the 27th day of February, 1922, the same being the 43rd Judicial Day, of the January Term, 1922, of said court the following further proceedings were had in said cause to-wit:

"Comes now the Fidelity Trust Co., trustee, and files petition for leave to enter into a lease contract with one Thomas West, for the lands held by it, by the terms of the trust deed herein, for the year 1922, which petition reads as follows:

State of Indiana)
Hamilton County) ss

IN THE CIRCUIT COURT, JANUARY TERM, 1922

Dora E. Rooker, et al vs. Fidelity Trust Company, Trustee	No. 16338 PETITION FOR APPROVAL OF LEASE

The Fidelity Trust Company, Trustee, respectfully represents and shows to the court that it has, since the affirmance by the Supreme Court of Indiana of the decree of this court wherein and whereby your trustee was directed to sell the lands and tenements in Hamilton County, Indiana, described therein as provided in said decree and pursuant to the terms of the trust agreement involved in said action and said decree, made effort to so sell said lands and tenements; that it has not been able to do so and will not be able to do so before the beginning of the crop year on March 1, 1922, for the reason that the plaintiff are now attempting to perfect an appeal
57 of said cause from the Supreme Court of Indiana to the Supreme Court of the United States; that on July 31, 1918, by agreement of the parties the Wainwright Trust Company was appointed temporary receiver to take charge of the said property and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn; that thereafter this court entered its judgment and decree for this trustee, which judgment and decree was thereafter finally affirmed by the Supreme Court of Indiana; that the aforesaid receiver had abdicated and neglected its duties wholly and has never reported to this court; that unless said tillable lands are rented and farmed for the crop year of 1922 it will cause

loss and waste to the trust estate; that therefore, your trustee has tentatively leased said tillable lands to one Thomas West for said year on a basis of grain rent and prays the lease thereof to him may be approved by the court and ordered delivered.

Fidelity Trust Company, Trustee,
By J. Albert Smith,
Vice-President.

J. Albert Smith being duly sworn on his oath says that he is Vice President of the Fidelity Trust Company which is trustee and defendant in the above cause and as such is informed of the facts set forth in the above and foregoing petition and that the same are true.

J. Albert Smith.

Subscribed and sworn to before me this 27th day of February, 1922

A. E. Sauch, Notary Public.

My commission expires Oct. 4, 1925.

Said petition is now granted by the court and said trustee now presents to the court its lease contract with said Thomas West, which lease contract is now approved by the court and reads as follows: (Not on file)

58 And afterwards to-wit on the 4th day of March, 1922, the same being the 48th Judicial Day, of the January Term, 1922, of said court the following further proceedings were had to-wit:

"Comes now Dora E. Rooker and William V. Rooker, and enter their special appearance for the purpose of setting aside and vacating the approval by the court of the lease entered into by the Fidelity Trust Company and one Thomas West as entered of record on the 27th day of February, 1922, which special appearance and objections are in the following words and figures to-wit:

State of Indiana)
County of Hamilton) ss

IN THE HAMILTON CIRCUIT COURT

Fidelity Trust Company, Trustee)
vs.) No.
Dora E. Rooker, et al)

Dora E. Rooker and William V. Rooker specially appearing herein for the purposes only of this motion move the court to set aside and vacate the order and judgment and proceedings had thereon, made and entered herein on to-wit, the 27th day of February, 1922, and for cause the said Dora E. Rooker and William V. Rooker say:

1. That said order and judgment and the proceedings had thereon are wholly void for the reason that the same were made, entered and taken wholly without any notice whatever to the said Dora E. Rooker and William V. Rooker, or either of them and wholly without their information and without the information of either of them.

2. That the jurisdiction of the parties to the subject matter of the proceedings herein complained of is and for many weeks continuously last past has been exclusively in the Supreme Court of the United States as must be and is apparent upon the facts in the premises to-wit: The real estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are
59 a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker, as plaintiffs and the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at one time but not since the year 1919 pending in this court as Cause No. 16338; that on to-wit, the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in this court in said cause; that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of this court; that on to-wit, the 22nd day of June, 1921, the Supreme Court of

Indiana affirmed said judgment of this court and thereafter on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on to-wit, the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States and to the Justices thereof for a writ of error to the Supreme Court of Indiana in said cause; that afterwards on to-wit, the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker lodged in the office of the clerk of the Supreme Court of the United States their transcript of said record proceedings and judgment and at the same time the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a writ of certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana and said petition was duly docketed as a cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money all as required by the rules and practice
60 of the Supreme Court of the United States; that afterwards on to-wit, the 15th day of December, 1921, the writ of error of the Supreme Court of the United States in said cause was issued on the petition therefor of the said Dora E. Rooker and William V. Rooker and at the same time Dora E. Rooker and William V. Rooker filed their supersedeas bond onditioned as provided by law for the payment of all damages, and costs which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, Dora E. Rooker and William V. Rooker filed their citation, and the proof of service thereof, in the office of the clerk of the Supreme Court of Indiana; that on December 19th, 1921, Dora E. Rooker and William V. Rooker lodged in said Clerk's Office a copy of said writ of error in said cause for said Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as trustee of the estate

of Dora E. Rooker; that on December 22nd, 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record proceedings and judgment of said Supreme Court in said cause on said writ of error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and is now pending as Cause No. 785, October Term, 1921, in the Supreme Court of the United States and for the better identification of said Cause, and for greater certainty, the said Dora E. Rooker and William V. Rooker now make reference to the said proceedings and judgment of this court in said cause No. 16338.

3. That said order and judgment of February 27, 1921, and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the 14th Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatsoever to the said Dora E. Rooker and William V. Rooker, or
61 either of them and without their having any knowledge whatsoever that said petition upon which said order and judgment were founded was filed and pending and being heard and determined in this court. That the first time said Dora E. Rooker and William V. Rooker or either of them learned of said order proceedings and judgment of February 27, 1922, was on the afternoon of March 3, 1922.

4. That said order and judgment and the proceedings had thereon take the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the 14th Amendment to the Constitution of the United States, for the reason that the Court in which said order and judgment and the proceedings had thereon were taken was wholly without jurisdiction of the parties and the subject matter of said petition for the reasons hereinbefore stated in recital of the steps taken to lodge and vest the jurisdiction over said parties and over said subject matter in the Supreme Court of the United States.

Wherefore the said Dora E. Rooker and William V. Rooker pray the judgment of this court that said order and judgment and the proceedings had thereon of February 27, 1922, be adjudged and held to be null and void and they pray that this court proceed no further; and they ask for all proper relief.

Christian & Waltz,
W. V. Rooker,

Attorneys for Dora E. Rooker, et al.

State of Indiana, County of Hamilton, ss

Dora E. Rooker and William V. Rooker, being first duly sworn on their oaths say that they are the defendants in the matter above entitled and that the foregoing answer is true and in substance and in fact.

And further they say not.

Dora E. Rooker.
William V. Rooker.

Subscribed and sworn to before me this 4th day of March, 1922.

[SEAL] J. D Hill, Clerk.

62 And afterwards to-wit on the 7th day of March, 1922, the same being the 50th Judicial Day, of the January Term, 1922, of said court the following further proceedings were had to-wit:

"Come now the parties and the motion of Dora E. Rooker and William V. Rooker to vacate the order of approval of the lease made between one Thomas West and Fidelity Trust Company is now overruled by the court to which ruling the said Dora E. Rooker and William V. Rooker excepts."

State of Indiana)
Hamilton County) ss

IN THE HAMILTON CIRCUIT COURT

Dora E. Rooker,
William V. Rooker,
Plaintiffs.
vs.
Fidelity Trust Company in its Corporate Capacity Proper,
Fidelity Trust Company, as Trustee of the Estate of Dora E. Rooker,
Defendants.

No. 16338

PRAECIPE FOR TRANSCRIPT

To the Clerk of the Hamilton Circuit Court of Indiana:

For the purposes of appellate review in the Supreme Court of the United States, upon supplemental Writ of Error and upon supplemental Writ of Certiorari, and for the purpose of contempt proceedings in the Supreme Court of the United States, on motion to commit for contempt and on attachment for contempt, you will please make out a full, true and complete transcript of all the record, pleas, proceedings, orders and judgments of your court in the cause above entitled to the date of this praecipe and beginning with and including the filing of the opinion, judgment and mandate of the Supreme Court of Indiana rendered and given in this cause on June 22, 1921, and to said transcript you will attach an original of this praecipe with the proof of service thereof and when said transcript shall have been completed you will affix thereto your certificate as provided by law over your hand and the seal of your court.

W. V. Rooker,
Attorney for Plaintiffs.

The defendants in the cause above entitled will please take notice that on Wednesday, the 5th day of April, 1922, the plaintiffs in said cause will file this their praecipe for a tran-

script of the record in the office of the clerk of the
64 Hamilton Circuit Court of Indiana.

W. V. Rooker,
Attorney for Plaintiffs.

Received copy of the above this day of April, 1922.

Attorney for Defendants.

State of Indiana)
County of Marion) ss

William V. Rooker being first duly sworn on his oath says: That on the 4th day of April, 1922, he served the foregoing notice of praecipe by delivering a copy thereof to Mr. James G. Flaherty, Secretary of the Fidelity Trust Company at the office of said trust company in the City of Indianapolis during the hours of business; that Mr Flaherty thereupon informed this affiant that Charles E. Cox, attorney for said trust company in said cause, was on that day absent from the city, but that he was to return presently whereupon said Flaherty would deliver said copy of said praecipe to said Cox; that previously on said day this affiant had called at the office of said Cox to serve on him said notice of praecipe, but affiant was then and there informed by the clerk in said office that said Cox was absent and would not return during the day; that after said visit to the office of said Cox this affiant called at the office of Mr. Henry Seyfried and delivered copies of said notice and praecipe to the clerk in charge of said office and requested that said Seyfried examine said notice and sign the same on his coming into his office; that thereafter this affiant called at the office of said Seyfried and received from his clerk the copies of said notice and praecipe unsigned together with a written memorandum from said Seyfried declining to sign said notice; that thereupon affiant served said notice upon said Flaherty as above stated.

And further affiant saith not.

William V. Rooker.

Subscribed and sworn to before me this 4th day of April, 1922. Witness my hand and official seal.

Mary Brown,
Notary Public.

My commission expires January 13, 1926.

66 State of Indiana }
County of Hamilton } ss

I, J. D. Hill, Clerk of the Hamilton Circuit Court of Indiana, do hereby certify the above and foregoing transcript is a full, true and complete transcript of all the record of said Court in Cause No. 16338 wherein Dora E. Rooker et al are plaintiffs and Fidelity Trust Company in this corporate capacity proper et al are defendants, made beginning on and since the 26th day of October, 1921, when the Clerk of the Supreme Court of Indiana filed in this office his certified copy of the opinion, judgment and mandate of said Supreme Court in said cause; that said transcript includes all papers filed, except where any has been amended and there the fact of amendment is noted and where a paper has not been filed in said cause it is noted as not on file; that said transcript includes also, all orders and judgments made and rendered, and included in said transcript is an original of the praecipe as said praecipe was filed in my office, by William V. Rooker, as attorney for plaintiffs, on this 5th day of April, 1922.

In Witness Whereof I hereunto affixed my hand and the seal of said Court at my office in the city of Noblesville, in Hamilton County, in the State of Indiana this 5th day of April, 1922.

J. D. Hill,

[SEAL] Clerk of the Hamilton Circuit Court.

FILED
JUN 5 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

385

LAW NO. 785 OCTOBER TERM 1921

ERROR TO THE SUPREME COURT OF INDIANA

DORA E. ROOKER, WILLIAM V. ROOKER

Petitioners

VS.

FIDELITY TRUST CO., in its Corporate Capacity Proper

FIDELITY TRUST CO., as trustee of the Estate of Dora E. Rooker

Respondents

PETITIONERS' BRIEF ON THEIR SUGGESTION OF DIMINUTION OF THE RECORD AND ON THEIR PETITION FOR CERTIORARI UNDER RULE 14 TO CORRECT SAME IN AID OF THE WRIT OF ERROR HEREIN.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

LAW NO. 785 OCTOBER TERM 1921

ERROR TO THE SUPREME COURT OF INDIANA

DORA E. ROOKER,
WILLIAM V. ROOKER,
Petitioners
vs.
FIDELITY TRUST COMPANY IN ITS CORPORATE CAPACITY PROPER, FIDELITY TRUST COMPANY AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER
Respondents

PETITIONERS BRIEF ON THEIR SUGGESTION OF DIMINUTION OF THE RECORD AND ON THEIR PETITION FOR CERTIORARI UNDER RULE 14 TO CORRECT SAME IN AID OF THE WRIT OF ERROR HEREIN.

I

STATEMENT OF THE CASE

Petitioners suggest a diminution of the record and they petition for certiorari under rule 14 to correct the diminution

in aid of the Writ of Error herein. The suggestions are as follows:

That said diminution consists in the exemplification of the judgment affected by the respondents herein with the aid of the Supreme Court of Indiana and the Hamilton Circuit Court of Indiana, to the effect that:

(1.) Upon the record herein these petitioners were not, nor was either of them, entitled to be heard and to have their day in Court, for the reason that in and by their deeds of trust in the premises they had parted with all their right, title and interest in and to the affected premises by outright sale to and outright purchase by the Fidelity Trust Company as trustee with no condition except as to price and terms of payment.

(2.) Upon the record herein the Trust Estate of said Dora E. Rooker never had its day in Court for the reason that Dora E. Rooker was incompetent, as being without interest, to defend said trust estate and there was no crossbill as between said Fidelity Trust Company in its corporate capacity proper, pretending to be the banker and creditor of its co-respondent, and said co-respondent trustee of the estate of Dora E. Rooker, which tendered any issue as to any claim or demand of said respondent as banker and creditor against said trustee affecting said trust estate.

(3.) Upon the record made by said respondents and said State Courts in this cause it is apparent, and conclusive that the theory and purpose of the action of the respondents in the premises, was to deny said trust estate its day in Court and that this was done, and that said trust estate was denied its day in Court to defend against the claim jointly asserted by and reduced to judgment in favor of said respondents.

(4.) Upon the record made by said respondents and said State Courts in this cause it is apparent and conclusive that said trust estate was denied the equal protection of the laws and its property was taken without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

(5.) Upon the record made by said respondents and said State Courts in this cause, in the premises it is nevertheless

apparent and conclusive that these petitioners Dora E. Rooker and William V. Rooker were the *cestuis que trust* of said estate and were the equitable owners thereof and that by the wrongful acts of said respondents and said State Courts these petitioners were denied the equal protection of the laws and their property was taken without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

(6.) That said acts in the premises of said respondents and of said State Courts are to the effect of admissions upon the record that said trust estate was denied the equal protection of the laws and its property taken without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(7.) That said acts in the premises of said respondents and of said State Courts are to the effect of admissions upon the record that said petitioners Dora E. Rooker and William V. Rooker, as said *cestuis que trust* were denied the equal protection of the law and that their property was taken without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(8.) That this Honorable Court is entitled to the presence of said admissions as (1) and estopped against said respondents and (2) for their probative effect in the lawful determination of this cause to the end that justice may be done and that said *cestuis* may be permitted to redeem said trust estate from said malevolent trustee upon the terms and conditions stated in the prayer for relief recited and set forth in their complaint herein.

II

The Federal Questions Classified

The Federal Questions in this case may be separated readily into three classes and stated according to the effect of certain legal principles with which each class is pregnant, to-wit:

1. The claim of a Federal right which was specially set up and pleaded. That Federal right was the right of Dora E. Rooker and William V. Rooker to transfer their cause to this Honorable Court from the Supreme Court of Indiana in the time, form and manner prescribed by the Act of Congress.

2. The transfer of jurisdiction of the cause to this Honorable Court, with procedure prescribed by law, so that the authority of this Court became complete and exclusive for all juridical purposes, regardless of whether the *supersedeas* had become effective or had not become effective. This class of questions depends upon the distinctions which exist in the powers of a court as those powers may be classed (1) judicial and (2) administrative. For judicial purposes there may be an appeal —the word appeal is used here in its generic sense to include all methods of appellate review—to this court without *supersedeas*. Where an appeal is perfected without *supersedeas* bond the authority of this court for all juridical purposes becomes complete and exclusive. Pending the appeal here no other court will be permitted to exercise any juridical power affecting the cause, and if such contrary power be assumed by the court below its exercise will be void and of no effect.

3. The transfer of jurisdiction by appeal with suspension of execution on *supersedeas*: In this class all the powers of the lower court, (1) juridical and (2) administrative, are suspended and any attempt below to exercise either class of powers will be void and of no effect.

BRIEF OF THE ARGUMENT ON PETITION

CERTIORARI CO-ORDINATES WITH AND AIDS A WRIT OF ERROR

This court has held that a writ of certiorari may be employed to aid a writ of error. Petitioners suggest a diminution of the record and they petition for a writ of certiorari under rule 14 to correct the diminution in aid of the writ of error herein. Preliminary questions involved cluster around these major inquiries, viz:

(1.) What is the record in the case?

(2.) What is a diminution of that record?

We shall contend that the words "record in the case" mean the same thing as "the case as it appears upon the record;" that the case as it appears upon the record embraces the *res*, and all of it, of the litigation, the parties to the case and finally the right of the affected court to proceed in the circumstances to determine juridical issues affecting the *res* of the litigation and affecting the rights of the parties in the subject matter of the case.

We shall contend that a diminution of the record means the absence from this court of any part of the case or the absence of any incident of authority, on the part of this court over the entire *res* of the litigation; the parties in respect of all their rights, and the dignity of this court as it is entitled to respect and to immunity from abridgement by the action of any other court acting concurrently.

We shall contend that your jurisdiction is not dependent upon how you shall decide the case finally. To employ a trite expression of the law, you have the authority to decide the case "right or wrong;" to decide it one way or the other, and your jurisdiction is not measured by the standard of how you shall finally determine the cause; that you are neither a "plaintiff court" nor a "defendant court" but rather that you are an expression of the sovereignty of the government endowed with that judicial function which is supposed to assure domestic tranquillity and the cause of justice by deciding controversies between the people. It is essential therefore that your jurisdiction should be complete and that it should be exclusive. It should, therefore, appear that if the parties now and then, or in a single instance, go into another court pending your jurisdiction, to secure the determination of a juridical issue affecting the *res* or the rights of the parties therein, then that act or those acts of going elsewhere, are evidence that not all the case is before you and that a diminution of the record prevails which should be corrected with your writ of certiorari, attended with an order of prohibition to the lower court against further meddling and a mandate to enforce rescission of acts already done *coram non judice*, and that unless such diminution of the record can be corrected with your proper writ that there is an hiatus in your office of sovereignty wherefore justice never may be complete.

The suggestions of the diminution of the record appear in the conduct of the parties to this case in the act, and in its recurrence, of going into the Hamilton Circuit Court of Indiana, pending your jurisdiction to have juridical issues heard and determined which affect the *res* of this case and the rights of the parties therein.

II

This court has held that a writ of certiorari may be employed to aid a writ of error issued out of this court and that a writ of certiorari may be employed to quash proceedings in an inferior court.

Harris v. Barber, 129 U. S. 366; 32 Law Ed. 697.
American Construction Co. v. Jacksonville etc. Co. et al, 148 U. S. 372, 387, 37 Law Ed. 486, 492.
Willis v. Eastern Trust Co., 169 U. S. 295; 42 Law Ed. 752.
Degge et al v. Hitchcock, 229 U. S. 162; 57 Law Ed. 1135.
Hartranft v. Mullowny, 247 U. S. 295; 62 Law Ed. 1123.

SPLITTING CASES IS NOT FAVORED BY THE LAW

Splitting cases is not favored by the law. There appears to be no jurisdiction in which two courts exercise concurrently jurisdiction over the same case. But there appears to be a marked distinction between splitting cases and those instances where one court is proceeding within its jurisdiction while the other court is proceeding without its jurisdiction.

This court has held that the right to take property without due process of law or in denial of the equal protection of the law was never foreclosed against proper inquiry, or in other words that the false judgment could afford itself no immunity to impeachment.

Where it appears upon the record in a primary action that an action *de novo* could be brought thereafter upon a Federal right which would *in limine* become the ba is of a writ of error out of this court to review the judgment in the action *de novo*, in such case the record in the primary action may be brought here on certiorari in the first instance without relegating the partes to a second action where might be laid a Federal right, to become the basis of a writ of error. Such primary actions often have been the basis of an action *de novo* in which the federal right was asserted which became the basis of the writ of error in the second suit.

Windsor v. McVeigh, 93 U. S. 277; 23 Law Ed. 916.
See McVeigh v. U. S. 11 Wall 267; 20 Law Ed. 81.
Pennoyer v. Neff, 95 U. S. 714; 24 Law Ed. 565.

Reynolds v. Stockton, 140 U. S. 254, 266; 35 Law Ed. 464, 468.
Hovey v. Elliot, 167 U. S. 409; 42 Law Ed. 215.

In the McVeigh Cases *supra* the taking of property without due process and the denial of the equal protection of the laws occurred when the State Court in the primary court said, in effect, to McVeigh; "You are not competent to raise any question in this case because you are a rebel."

In Pennoyer v. Neff *supra* the taking of property without due process and in denial of the equal protection of the laws occurred when State Court in the primary case said, in effect, to Neff: "Your right to defend shall be confined to the property attached but the courts power over you may extend beyond the proceeding *in rem* and it may award a judgment *in personam* against you. In so far as the judgment *in personam* exceeded the jurisdiction *in rem* the judgment of the State Court contravened the 14th Amendment. Certiorari will permit a review of such cases here without exposing the party aggrieved to the burden of a second suit in which he may set up his federal right in such manner as to guarantee him a writ of error.

The joint counter claim herein of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, is itself a repudiation of the trust agreement and is a wrong which is forthwith actionable.

Union Pacific R. Co. v. Durant, 95 U. S. 567; 24 Law Ed. 391.
Spiedel v. Henrici, 120 U. S. 377; 30 Law Ed. 718.

There cannot be a trustee without a *cestui que trust*. Mr. Justice Miller speaking to this point said for this Court; "If the United States is a trustee there must be *cestui que trust*. There cannot be the one without the other, and the trustee cannot be a trustee for himself alone. If the legal right and the use is in the same party and there are no ulterior trusts, it ceases to be a trust."

United States v. Union Pac. R. Co., 98 U. S. 569; 25 Law Ed. 143.

SUPPLEMENTAL FEDERAL QUESTIONS

The proceedings in the Hamilton Circuit Court on the petition of the Fidelity Trust Company as trustee to divest the possession of Mrs. Rooker, the *cestui que trust*, of lands of the trust estate and vest the possession in West as tenant of

the trustee, were void for want of jurisdiction and constituted a taking of Mrs. Rooker's property without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States for each of the following reasons:

Neither Mrs. Rooker nor any person in her behalf had any notice or knowledge of the proceedings. The term had gone by; the judgment in so far as it had any legality had become final and it could not be opened nor modified without notice; the lease was new matter which could not have been made a part of the original decree, although Dora E. Rooker and William V. Rooker were at hat time in Court.

Smith v. Woolfolk, 115 U. S. 143; 29 Law Ed. 357.

Grover and Baker etc. Co. v. Radcliffe, 137 U. S. 287; 34 Law Ed. 670.

Reynolds v. Stockton, 140 U. S. 254; 35 Law Ed. 464.

Owens v. Henry, 161 U. S. 642; 40 Law Ed. 837.

Great Western etc. Co. v. Purdy, 162 U. S. 329; 40 Law Ed. 986.

Hovey v. Elliot, 167 U. S. 409; 42 Law Ed. 215.

Wetmore v. Karrick, 205 U. S. 141; 51 Law Ed. 745.

New York Life Ins. Co. v. Dunlevy, 241 U. S. 518; 60 Law Ed. 1140.

Where this court has jurisdiction it has the right to decide every question in the case.

Elliott v. Piersol, 1 Pet. 340.

Wilcox v. Jackson, 13 Pet. 511.

Hickey's Lessee v. Stewart, 3 How. 750; 11 Law Ed. 814.

The writ of Certiorari is a right of justice and it may issue where a writ of error would not lie.

Tidd Pr. Sec. 398.

Bacon, Abe. tit. certiorari

Ex Parte Chetwood, 165 U. S. 443; 41 Law Ed. 782.

Harriman v. Northern Securities Co., 197 U. S. 244; 49 Law Ed. 739.

It is proper procedure to make supplemental complaint and exposition of new matter occuring in the cause after the original steps were taken, and this is the rule whether on the one hand the supplemental matter is addressed to the substance of the original complaint or, on the other hand, is

addressed to that province of the Court which is called its ancillary jurisdiction.

I Foster Fed. Pr. Sec. 51.

Milwaukee etc. R. Co. v. St. Paul Co., 2 Wall. 609; 17 Law Ed. 886.

Peoples' Bank v. Calhoun, 102 U. S. 256; 26 Law Ed. 101.

Krippendorf v. Hyde, 110 U. S. 276; 28 Law Ed. 145.

Pacific R. Co. v. Missouri etc. R. Co., 111 U. S 505; 28 Law Ed. 498.

Williams v. Morgan, 111 U. S. 684; 28 Law Ed. 559.

Johnson v. Christian, 125 U. S. 642; 31 Law Ed. 820.

Carey v. Houston etc. R. Co., 161 U. S. 115; 40 Law Ed. 638.

JURISDICTIONAL EFFECT OF SUPPLEMENTAL ERRORS

Where this court has jurisdiction it has jurisdiction to decide every question in the case, but those questions must be juridical as distinguished from administrative. If after the rendition of the judgment which is in review it should appear upon proceedings below upon the judgment that the judgment was pregnant with error in contravention of the Constitution of the United States and that those errors, whether developed by the administrative function of execution, or continuing dormant and a menace, were capable of being reduced to juridical issues in an subsequent cause of action upon the judgment which subsequent suit, distinctively and beyond question would make a case arising under the Constitution of the United States, and of which this Court clearly would have jurisdiction on a writ of error, could there be any doubt, in those circumstance, that this court on certiorari or writ of error, would supplement its jurisdiction in the first instance and without delay and that this court would avoid putting upon the parties the burden of subsequent suits and their prosecution through the Supreme Court of the state and thence here by writ of error for the mere sake that justice should be ritualistic, rather than speedy and complete. Such subsequent proceedings have, it is true been resorted to in other causes and they are effective but they are not proof of any exclusive remedy on the erroneous judgment.

Rose v. Himely, 4 Cranch 241; 2 Law Ed. 608.

Jecker v. Montgomery, 13 How. 498; 14 Law Ed. 240.

Florida v. Georgia, 17 How. 478; 15 Law Ed. 181.
White v. Hart, 13 Wall 646; 20 Law Ed. 685.
Windsor v. McVeigh, 93 U. S. 274; 23 Law Ed. 914.
Pennoyer v. Neff, 95 U. S. 714; 24 Law Ed. 565.
Hanley v. Donoghue, 116 U. S. 1; 29 Law Ed. 535.
Scott v. McNeal, 154 U. S. 34; 38 Law Ed. 896.
New Orleans Water Works v. New Orleans, 164 U. S. 471; 41 Law Ed. 518.
Hovey v. Elliot, 167 U. S. 409; 42 Law Ed. 215.
Bell v. Bell, 181 U. S. 175; 45 Law Ed. 804.

It is not collateral attack to say of a former judgment that it was rendered in denial of due process of law, if rendered without jurisdiction in the court or without notice to the party or beyond the issues.

Old Wayne Mut. L. Assn. v. Mc Donough, 204 U. S. 8; 51 Law Ed. 345.
Hovey v. Elliott, 167 U. S. 409; 42 Law Ed. 215.
Wetmore v. Karrick, 205 U. S. 141; 51 Law Ed. 745.
Roller v. Holly, 176 U. S. 398; 44 Law Ed. 520.
Londoner v. Denver, 210 U. S. 373; 52 Law Ed. 1103.
Pennoyer v. Neff, 95 U. S. 714; 24 Law Ed. 565.
Reynolds v. Stockton, 140 U. S. 254; 35 Law Ed. 464.

Is not this case the direct antithesis of Pennoyer v. Neff, 95 U. S. 723; 24 Law Ed. 569 and within the meaning of the rule in that case. In Pennoyer's case a personal judgment against him was taken in a case *in rem*. Here a judgment is taken *in rem*, in a case where the service was personal and was made on a party who was averred to be without any interest in the *res* of the litigation. If the personal judgment against Pennoyer was void in the proceeding *in rem* then is not the judgment *in rem* void here where the service was personal and made to answer an issue entered that the defendant sued had no interest in that which she was summoned to defend, the judgment thereafter rendered sustaining in fact the averments of the complaint that she had no interest in the *res*.

In Reynolds v. Stockton *supra* the Court of New Work had in effect said to Joel Parker; "Because you have an attorney who is exposed to the commands of this court we may impose a judgment on you which is beyond the issues stated in the pleadings."

In Hovey v. Elliott, *supra*, the Court of Appeals of New York held that the District Court of the District of Columbia proceed without right after it said to McDonald and White "You are in contempt and, therefore, you are not competent to raise any issue in the cause in which you have been sued."

So, in all the cases cited *supra*, the primary court had rendered a judgment in denial of the right to be heard, either by transcending the jurisdiction over the person of the defendant or over the subject matter of the action, or over the issues entered by the pleadings, or by imposing conditions upon the right to be heard which were in contravention of the fundamental law.

So in this case the Trustee and its creditor the Trust Company as a banker conspired together to say to Mrs. Rooker "You shall not be heard in this suit we have brought because heretofore you have parted with your interest."

Clearly if Mrs. Rooker had no interest in the trust estate she was not competent to defend it, the trust estate was without its day in court upon the issue entered by its trustee and another as joint plaintiffs with Mrs. Rooker as nominal defendant. So, if Mrs. Rooker, had in fact an interest in the trust estate, the action of the trial court in denying her competency to defend that interest, took her property without due course of law and in denial of the equal protection of the laws, provided only she had, in fact and in law an interest in the estate where her interest was thus denied a hearing. Thereupon the question arises; May Mrs. Rooker present the federal right by certiorari upon this record or shall she, for the sake of mere ritualism, be required to go back to *nisi prius* and assert her federal right *de novo* in a second action.

The writ of certiorari is a writ of justice rather than of ritualism.

THE FALSE THEORY OF PURCHASER

The fundamental error in the proceedings in this case, and one upon which Dora E. Rooker was denied the equal protection of the laws and her property was taken in denial of due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, traces to the false premise that the estate of Dora E. Rooker was sold by

her and was purchased by the Trust Company in its own right without condition other than price and payment and that the conveyance was not made upon a trust.

It might, of course, be true that Dora E. Rooker should not de notified of proceedings in court concerning the affected property if she had sold that property to the Trust Company anb had retained no right, title and interest and the Trust Company in its own right had purchased that property from Mrs. Rooker with no conditions except price and terms of payment. If that premise were true, instead of false, Mrs. Rooker would be a general creditor of the Trust Company rather than the equitable owner of the trust estate. In that event the utmost specific interest she could have in the trust estate might be a vendor's lien upon it to secure the payment of the purchase price.

JUDGMENT MADE FALSE BY CONSPIRACY

To illustrate in another way the infirmity of the judgment against the trust estate rendered on the joint counter-claim of the trustee and its banker, let us suppose that the trustee and its banker conspired to aid one another in an action against the trust estate and to that end they filed their complaint against the admittedly fictitious John Doe averring the outright sale of the property by its former owner to the trustee in its own right, and the advancement of the bankers' funds to the trustee, wherefore they asked judgment jointly against the trust estate. Suppose, farther, that while the John Doe suit was pending Dora E. Rooker had intervened and claimed to be the equitable owner of the trust estate and had asked the Court to direct an inquiry as to her interest. This inquiry is called an examination *Pro Interesse Suo* (Daniell Ch. P. C. XXVI, sec. 7, p. 157). Suppose further that Dora E. Rooker's petition was heard and it was adjudged that she had no interest in the trust estate would such adjudication be permitted to sustain the judgment against the trust estate on the John Doe complaint on the theory that Dora E. Rooker's intervention, though it had been defeated, had submitted the trust estate to judicial inquiry for all purposes and therefore the trust estate could not complain of the John Doe judgment on the theory that in it the trust estate was denied due process of law and its

property taken in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States. Did not the court's adjudication that Dora E. Rooker had no interest conclude the Court, as well as all the parties, to the effect that Dora E. Rooker was incompetent to defend the trust estate and therefore had not defended it? If Dora E. Rooker had not defended the trust estate because she was incompetent to do so, then, is not that adjudication conclusive that in so far as Dora E. Rooker was concerned and her interests affected, the trust estate had not been defended. In the absence of a cross bill by the Trust Company as a banker against the Trust Company as trustee, or vice versa, the judgment rendered in this case shows that the trust estate was not in court as a defendant at the joint suit of the Trust Company in its corporate capacity and the Trust Company as trustee of the estate of Dora E. Rooker, and therefore the judgment on the joint complaint in favor of the conspirators was *coram non judice* and void.

Krippendorf v. Hyde, 110 U. S. 276; 28 Law Ed. 145.

Pacific R. Co. v. Missouri R. Co., 111 U. S. 505; 28 Law Ed. 498.

Morgans Louisiana etc. Co. v. Texas etc. R. Co., 137 U. S. 171; 34 Law Ed. 625.

The money judgment in this case wherein the trustee and its banker sued the trust estate was clearly beyond the issue. It is settled that one defendant cannot have a decree against a codefendant without a cross bill, with proper prayer and process or answer as in an original suit. There was no cross bill in this suit as between the trustee and its banker.

Elliot v. Stevenson, 21 Ind. 359.

Sims v. Burk, 109 Ind. 214.

Webb v. John Hancock etc. Co., 162 Ind. 616.

Smith v. Woolfolk, 115 U. S. 143; 29 Law Ed. 357.

But in this case the Trustee conspiring with its banker to fix the false claim of the latter as a judgment against the trust estate sued Dora E. Rooker and William V. Rooker as fictitious and false defendants asserting them to have no interest in the trust estate but averring that they falsely claimed to have. There was no cross petition between the trustee and its banker, the Trust Company in its corporate capacity proper upon

which there could be an adjudication as between them of the amount of the bankers claim or of the trustees interest, estate and power.

FALSE THEORY OF PURCHASER DEMONSTRATED BY THE COURT

It was upon this false theory that Dora E. Rooker was only a general creditor of the Trust Company, rather than the equitable owner of the trust estate, that the following recent proceedings were had in this cause which denied Mrs. Rooker the equal protection of the laws and took her property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

First: On February 27, 1922, the Trust Company filed its petition in the Hamilton Circuit Court, "For leave to enter into a lease contract with one Thomas West, for the lands held by it under the terms of the trust deed herein for the year 1922." The transcript exhibits the petition but it does not exhibit the lease the same having been withheld from record by the Trust Company and by West. The lease was on the same day approved and on March 1, 1922, West was put in possession. No notice of these proceedings was given to Dora E. Rooker or William V. Rooker and the first knowledge either of them had was on the afternoon of March 3, 1922, when West informed Mrs. Rooker and her daughter that they were trespassers in their home and that they must surrender possession to him forthwith.

On March 4, 1922, Dora E. Rooker and William V. Rooker, "specially appearing herein for the purpose only of this motion" moved the Court "to set aside and vacate the order and judgment and proceedings had thereon, made and entered herein on Court the 27th day of February, 1922, and for cause the said Dora E Rooker and William V. Rooker say:

"1. That said order and judgment and the proceedings had thereon are wholly void for the reason that the same were made, entered and taken wholly without any notice whatever to the said Dora E. Rooker and William V. Rooker, or either of them, and wholly without their information and without the information of either of them.

"2. That the jurisdiction of the parties to the subject matter of the Proceedings herein complained of is and for

many weeks continuously last past has been exclusively in the Supreme Court of the United States as must be and is apparent upon the facts in the premises, to-wit: The real estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker as plaintiffs and the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at that time but not since the year 1919, pending in this Court as cause No. 16,338; there on, to-wit, the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in this court in said cause: that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of this court; that on, to-wit, the 22nd day of June, 1921, the Supreme Court of Indiana affirmed said judgment of this Court and thereafter on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on to-wit, the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States, and to the justice thereof, for a writ of error to the Supreme Court of Indiana in said cause; that afterward on, to-wit, the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker lodged in the office of the Clerk of the Supreme Court of the United States their transcript of said record proceedings and judgment and at the same time said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a writ of Certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana, and said petition was duly docketed as a cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V.

Rooker filed their briefs and made their cash deposit of money all as required by the rules and practice of the Supreme Court of the United States; that afterward on, to-wit, the 15th day of December, 1921, the writ of error of the Supreme Court of the United States in said cause was issued on the petition therefor of the said Dora E. Rooker and William V. Rooker and at the same time Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for the payment of all damages and costs, which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, Dora E. Rooker and William V. Rooker filed their citation, and the proof of service thereof, in the office of the Clerk of the Supreme Court of Indiana; that on December 19th, 1921, Dora E. Rooker and William V. Rooker lodged in said Clerks office a copy of said writ of error in said cause for said Fidelity Trust Company in its corporate capacity proper and Fidelity Trust Company as trustee of the estate of Dora E. Rooker; that on December, 22nd. 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana, their praecipe for a transcript of the record proceedings and judgment of said Supreme Court in said cause on said writ of error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and is now pending as cause No. 785 October term, 1921, in the Supreme Court of the United States and for the better identification of said cause, and for greater certainty, the said Dora E. Rooker and William V. Rooker now make reference to said proceedings and judgment of this court in said cause No. 16338.

"3. That said order and judgment of February 27, 1921, and the proceedings had thereon take the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the 14th Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatsoever to the said Dora E. Rooker and William V. Rooker, or either of them and without their having any knowledge whatsoever that said petition upon which said order and judgment were

founded was filed and pending and being heard and determined in this Court. That the first time said Dora E. Rooker and William V. Rooker, or either of them learned of said order, proceedings and judgment of February 27, 1922, was on the afternoon of March 3, 1922.

"4. That said order and judgment, and the proceedings had thereon take the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the 14th Amendment of the Constitution of the United States, for the reason that the court in which said order and judgment and the proceedings had thereon were taken, was wholly without jurisdiction of the parties and subject matter of said petition for the reasons hereinbefore stated in recital of the steps taken to lodge and vest the jurisdiction over said parties and over said subject matter in the Supreme Court of the United States.

"Wherefore the said Dora E. Rooker and William V. Rooker pray judgment of this court that said order and judgment and the proceedings had thereon of February 27, 1922, be adjudged and held to be null and void and they pray that this court proceed no further, and they ask for all proper relief."

The motion was duly verified by Dora E. Rooker and William V. Rooker.

Notice was given to the adversary parties and they appeared on March 7, 1922, but they offered no pleadings. The Court without issued joined, and without affidavits or evidence denied the motion of Dora E Rooker and William V. Rooker to vacate the order of and judgment of February 27, 1922, and allowed the lease to remain in effect. The Courts attention was called to the fact that no copy of the lease was on file or among the records of the Court. He said that West had a copy of the lease. The Clerk's transcript shows that the files of the Court remain without a copy of the lease.

It was the obvious purpose of the lease and of the Courts proceedings on February 27, 1922, to anticipate and forestall the action of this Court. The petition for approval of the lease contains the following averments in respect of this Court jurisdiction, viz:

"The Fidelity Trust Company, trustee, respectfully represents and shows to the Court that it has, since the affirmance

by the Supreme Court of Indiana of the decree of this Court wherein and whereby your trustee was directed to sell the lands and tenements in Hamilton County, Indiana, described therein as provided in said decree and pursuant to the terms of the trust agreement involved in said action and decree, made effort to so sell said lands and tenements; that it has not been able to do so and will not be able to do so before the beginning of the crop year on March 1, 1922, for the reason that the plaintiffs are now attempting to perfect an appeal of said cause from the Supreme Court of Indiana to the Supreme Court of the United States."

The trustees petition of February 27, 1922, was not signed by any attorney. It was subscribed; "Fidelity Trust Company trustee by J. Albert Smith, Vice-President." However Charles E. Cox presented the petition to the Court and obtained the entry of approval based on the petition. Charles E. Cox appeared, also and resisted the motion of Dora E. Rooker and William V. Rooker to vacate the order etc. on February 27, 1922.

NATURE OF THE TRUST CONTRACT

What is the nature of Dora E. Rooker's interest in the premises? She has parted with an interest in an estate of great value. She says that the conveyance of that estate was conditional and that the condition was the creation of a trust. The Fidelity Trust Company says that Mrs. Rooker parted with the fee simple title and that as to the trust estate there were no conditions in the transfer; that Dora E. Rooker has no interest in the trust estate at the present time, nor has she had any interest therein since the deeds of conveyance and the trust agreement were made. The Fidelity Trust Company's position upon the record is an admission that the trust agreement has not been performed because there was no trust agreement to be performed; that as to this non-performance it is contended by the Trust Company that Dora E. Rooker, stands only as a creditor of the Trust Company, just as she would stand as a creditor of any other person to whom she had made a general sale of property without prepayment of the purchase price. In a relative sense it therefore may be said when we come to consider the Trust Company's position that we are to inquire, who is Dora E. Rooker's debtor? Is she, a

creditor of the trust estate? Or is she not the creditor of the trust estate but the creditor only of the Trust Company the person to whom her property was conveyed upon an executory contract which has not been performed? Of course, in making this inquiry, Dora E. Rooker does not admit that the Trust Company's interpretation is correct and that her position has been reduced to the Status of a mere creditor. The inquiry is invited to show its fallacy through the medium of illustration and to make clear the position contended for by the Trust Company. Dora E. Rooker contends, (1) That she is the equitable owner of the trust estate and (2) that upon the acts of repudiation by the Trust Company, trustee, she became the enforced trustee of her own trust estate for the use and benefit of those who, relying upon the trust deeds and the trust agreement, became creditors of the trust estate.

REPUDIATION TRANSFERRED THE RIGHTS OF THE TRUST COMPANY FROM THOSE OF A TRUSTEE TO THOSE OF A CREDITOR OF THE TRUST ESTATE

If Dora E. Rooker's contention be correct that by the proceedings in the premises the Trust repudiated the trust agreement to the end that the trust fell by force of law to Mrs. Rooker, for preservation at least if not for execution, then and in that event, the Trust Company became and now it is no more than a creditor of the trust estate upon a claim exposed to all the legal defenses which could be used properly against any other creditor of the same class. It would not be proper, of course, for Mrs. Rooker to continue to act as the trustee of her own estate and she has at no time sought to do that, but the exigencies of the case impose this duty upon her as a matter of law rather than as a matter of contract until a new trustee may be appointed. As to the period between the lawful dominion of the trustee who repudiated and the prospective dominion of the trustee who is to be designated, Mrs. Rooker stands as bridge or passage way through which the trust estate may pass from the delinquent trustee to its successor in office, and to this effect she now is the forced trustee of her own estate as well as its equitable owner.

A similar question, in some respects, was before this court in Harriman v. Northern Securities Company, 197 U. S. 244; 49 Law Ed. 739. In that case, following a decree disclosing the

Northern Securities Company as reproachful to the Act of Congress prohibiting combinations or conspiracies in restraint of trade and commerce, (193 U. S. 197; 48 Law Ed. 679) Harriman and others asserting that the Northern Securities Company was a trustee of specific property rather than a purchaser in its own right, sought to recover specific property they had conveyed to the Securities Company. The Circuit Court held upon the facts that the Northern Securities Company was not a trustee but a purchaser and that Harriman was a general creditor of the Securities Company rather than the equitable owner of an estate lodged in the Securities Company as trustee. The Court below, and this Court alike, were cautious in their statement of the facts and the law, to the end that it should appear clearly that the decision was founded upon the facts. There was no controversy that the Securities Company might have attempted to take over the affected property as trustee rather than as purchaser, but upon the facts it had not done so.

THE LAW OF TRUSTS IS THE LAW OF THE CASE

On the former appeal to the Supreme Court of Indiana, the trust deeds and contracts herein issued were held to constitute a single transaction and that transaction to be the creation of a trust, and not a mortgage.

Rooker v. Fidelity Trust Co., 185 Ind. 172.

That decision fixed forever the character of the instruments as between the parties and precluded the defendants in error from asserting now that they bought the property not upon a trust but outright and that Dora E. Rooker no longer had any interest in the trust estate and was not therefore entitled to notice of proceedings in court affecting the final estate.

Dodge v. Gaylord, 53 Ind. 365.

Brunson v. Henry, 152 Ind. 310.

Westfall v. Wait, 165 Ind. 353.

This rule of the law of the case estops the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee from changing its theory as it has attempted to do. At first the Trust Company claimed to be a mortgagee; now it claims to have been an outright purchaser.

Dora E. Rooker having transferred to the trustee the property comprising the trust estate and having made the conveyance upon the condition and terms stated in an agreement which created a trust and was executory, a right of action in her behalf arose when the defendant attempted to withdraw from or repudiate the contract.

Roehm v. Horst, 178 U. S. 1; 44 Law Ed. 953.

The Eliza Lines, 199 U. S. 125; 50 Law Ed. 115.

Citizens National Bank v. Davisson 229 U. S. 215; 57 Law Ed. 1153.

Central Trust Co. v. Chicago Auditorium Assn., 240 U. S. 581; 60 Law Ed. 811.

United States v. Purcell Envelope Co., 249 U. S. 313; 63 Law Ed. 620.

Kurtz v. Frank, 76 Ind. 594.

Adams v. Byerly, 123 Ind. 368.

Riley v. Walker, 6 Ind. App. 622.

Indiana Life Ins. Co. v. Reed, 54 Ind. App. 450.

Oklahoma Vinegar Co. v. Carter, 116 Ga. 145; 94 Am. St. Rep. 112.

Smith v. Georgia L. Co., 113 Ga. 977.

Spiers v. Union Drop Forge Co., 180 Mass. 92.

Emory Mfg. Co. v. Salomon, 178 Mass. 583.

Gearty v. Mayor etc., 171 N. Y. 71.

Mutual etc. Assn. v. Taylor, 99 Va. 213.

The trust agreement was clearly defined, it created a trust and was executory. The term of contract in respect of the element of time may fix an ultimate date or it may contemplate a definite service to be performed. The obligations of such contracts are mutual.

Vinton v. Baldwin, 88 Ind. 104.

Foulks v. Falls, 91 Ind. 315.

French v. Cunningham, 149 Ind. 632.

Tatterson v. Suffolk Mfg. Co., 106 Mass. 56.

Pfeister v. Western Union, 282 Ill. 69.

The trust agreement was bilateral and therefore, not exposed to ex parte rescission.

I Williston on Contracts, Secs. 65, 68.

III Williston on Contracts, Secs. 1301-1303.

Harson v. Pike, 16 Ind. 140.
Coffman v. *Keight'y*, 24 Ind. 509.
Board v. Bearss, 25 Ind. 110.
Hayden v. Souger, 56 Ind. 42.
Sithin v. Board, 66 Ind. 109.
Board v. Hammond, 83 Ind. 453.
Vigo Agricultural Soc. v. Brumfiel, 102 Ind. 146
Everman v. Hymen, 26 Ind. App. 165.

ACTS OF REPUDIATION WERE ACTIONABLE WRONGS

The assertion by the Fidelity Trust Company that the trust deed was a mortgage was itself a repudiation of the trust agreement and a renunciation of the trusteeship and the trust. This act of repudiation was intensified and made certain with the foreclosure of the trust deed as a mortgage and with the execution sale of the trust estate, made on the decree of foreclosure, and with the taking and recording of sheriffs' deeds based upon the execution sales. So, here, now, the declaration of the trustee that it acquired the property by purchase outright and that Dora E. Rooker and William V. Rooker parted with all their interest except in the proceeds of sale, if any sale was made upon terms adequate to leave a residue is, also, a repudiation of the trust agreement. But if the Trust Company should wish to retract its earlier acts of repudiations it must do so within the terms of the law. It may reach a place of repentance in its mad career of loot and spoilation and when that point is arrived at the Trust Company must offer to do justice.

NO LOCUS POENITENTIAE

This doctrine of *Locus Poenitentiae* has been disregarded wholly by the Fidelity Trust Company in its corporate capacity proper and as trustee of the estate of Dora E. Rooker in this case. It has made no restitution and offered none for the great wrongs it has committed—

1. In contesting claims which as trustee it should have paid.
2. In repudiating the trust, with notice on October 28, 1912.
3. In suing to foreclose the trust deed as a mortgage.
4. In procuring witnesses to testify to sustain the trust deed as a mortgage.
5. In procuring the trial court in the first instance to decree

that the trust deed was a mortgage and to foreclose the same accordingly.

6. In purchasing and procuring the assignment of liens and asserting the same against the trust estate.

7. In having execution sale made of the trust estate on the decree of foreclosure.

8. In purchasing all the property of the trust estate at sheriff sale on decree foreclosing the trust deed as a mortgage.

9. In acquiring title, hostile to the trust to all the property of the trust estate by sheriff's deed on sale under the decree foreclosing the trust agreement as a mortgage.

10. In suing to enforce against Dora E. Rooker, specific liens against the trust estate which had been purchased by the Fidelity Company during the years while it claimed to be a mortgagee and not a trustee.

11. In imposing upon Dora E. Rooker the duty to preserve the trust and the trust estate against waste and the many attempts of the Fidelity Company to convert and appropriate.

12. In further repudiating the trust agreement by engaging in a conspiracy with the Fidelity Company in its corporate capacity proper, whereby they jointly were to sue Dora E. Rooker, as they did sue, on the claim of the Trust Company as a banker and creditor of the trustee; to aver as they did aver in their joint counter claim, asserting the claim of the banker that she had no interest in the property because she had sold it to the trustee and the trustee had acquired title as a purchaser in its own right; to persuade the trial court to adopt as they did persuade it to adopt their theory that Mrs. Rooker had no interest and therefore no right to complain of the waste which had been committed, no right to complain of the expense which had been imposed upon her in form of attorneys fees and expenses in defending the trust and preserving the trust estate; no right to complain of the long delay in carrying out the trust, by reason of which delay there had been an interest accumulation of approximately thirty per cent of the value of the Trust Company's pretended claim; to prevail upon the Court as they did prevail upon the Court not to consider any of her grievances on the theory that she being without any interest had no right to complain and upon an adjudication to that effect to allow judgment against the trust estate in the full

sum of the padded and false claim of the banker, with not the slightest offset in favor of Mrs. Rooker or the trust estate.

In their zeal the conspiring Trust Company and trustee went too far because if Dora E. Rooker had no interest, then she was incompetent to defend the trust estate and if she was incompetent to defend the trust estate then the trust estate had no defendant and no day in Court and the judgments of the Court below are in contravention of the due process and the equal protection clause of the Fourteenth Amendment and are void.

In the principle of *Locus Poenitentiae* it is assumed that a time may come when a wrong doer may wish to repent. Where that situation arises the law will extend its grace. The wrong doer may upon terms and the tender of justice be allowed to change his position. But here there has been no offer to do justice. On the contrary, their policy has been to intensify the wrongs which attended their previous conduct. They seek to make the procedure in their case unilateral and to depend upon their caprice. The courts will not aid them in that policy.

St. Louis etc. R. Co., v. Terre Haute etc. R. Co., 145 U. S. 393; 36 Law Ed. 748.

The Eliza Lines, 199 U. S. 119; 50 Law Ed. 115.

Harriman v. Northern Securities Co., 197 U. S. 244; 49 Law Ed. 739.

Union Pacific R. Co. v. Durant, 95 U. S. 576; 24 Law Ed. 391.

No place appears for the principle of *Locus Poenitentiae* in the program of the defendants in error in this case.

At first the program of the defendants was to deny the trust deed upon the theory that it was a mortgage. Being defeated in that theory with the first decision of the Supreme Court of Indiana (Rooker v. Fidelity Trust Company, 185 Ind. 172) the defendants next adopted the theory that the trust deed and the agreement which went with them, were the conveyance of an absolute estate in fee simple to the Trust Company as a purchaser in its own right with no conditions except terms of payment. In this respect they contend that Mrs. Rooker sold the property absolutely. An analogy for their present theory may be found in Mr. Harriman's experience with the Northern Securities Company as the exposition of that experience was made by this court in Harriman v. Northern Securities Company, 197 U. S. 244; 49 Law Ed. 739. In that case Mr. Harri-

man endeavored to participate in the dissolution of the Securities Company upon the theory that it acquired the holdings of his property as a trustee rather than as a purchaser upon an absolute sale made by him with no condition imposed except as to price. In Harriman's Case this Court approved the findings of the lower court made upon the testimony of Mr. Harriman himself that there was no trust but that there had been a sale made by him and a purchase by the Securities Company with no conditions imposed upon the transfer of the property except as to price.

But in this case Mrs. Rooker is suing to redeem the property from a trustee who had repudiated. In her complaint at the threshold of this case she asked the Court for an accounting, to ascertain any amount due to the delinquent trustee and to fix an upset time for the payment of whatever might be found to be due to the Trust Company. In order that the security of the lien of the Trust Company, as well as the liens of all other creditors of the trust estate, might not be impaired Mrs. Rooker asked the court to sequester her trust estate with a receivership until the proceedings in the case could be brought to judgment and the judgment performed. In taking this position Mrs. Rooker's attitude toward the trust estate was similar to the attitude of Mrs Burgess toward her property in the case of Graffam v. Burgess, 117 U. S. 180; 29 Law Ed. 839.

To remove any question as to the purpose of Mrs. Rooker and her husband and the theory of the action we here quote the prayer of her complaint, to wit:

"Wherefore these plaintiffs demand judgment, that an accounting be had of the extent of the interest of said Fidelity Trust Company in and to said property and that a reasonable time be fixed in which said indebtedness may be paid and that in the meantime a receiver be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement and to perform with respect thereto such duties as the Court may from time to time direct and that damages sustained by said Dora E. Rooker because of the non-performance of said contract be ascertained, and that she be given judgment accordingly; that said co-defendants of said Fidelity Trust Company be required to set up their several respective interests in the premises or on default that they be

forever barred and shut out and that the Clerk of this Court upon the rendition of such judgment be ordered and directed to enter of record the release and satisfaction of each and every such lien and incumbrance and plaintiffs pray for all proper relief." Transcript p. 16.

The trust deeds and the trust agreement are sufficiently stated in the second opinion of the Supreme Court of Indiana from which this cause is prosecuted. This second opinion of the Indiana Supreme Court is set out in the transcript in the instant proceedings for Writs of Certiorari and Error, and in the brief cited Supra said opinion of the Supreme Court of Indiana appears at pages 105-124. Transcript of Main Case pp. 29-36.

Two obvious purposes attend the policy of the Fidelity Trust Company in this case viz.

1. To acquire for itself the trust estate.

2. To avoid compensating Mrs. Rooker for the loss and expense entailed upon her by the misconduct of the trustee. These items included the waste of the trust estate because of years of idleness when the Trust Company, contending that it was only a mortgage, refused to perform its obligations as trustee to maintain the trust estate and the business conducted thereon; the many years of delinquency in which the trustee failed to perform the trust contract by sale of the trust property under the trust agreement, and because of which delay there now are interest accumulations asserted against the trust estate approximating $20,000.00; the fees of counsel and the experience and cost of this litigation since October 30, 1912, when Mrs. Rooker began her effort to redeem the trust property and rescue the trust from the delinquent trustee; the fabrication of claims against the trust estate and their acquisition by the Trust Company at one time as a pretended "Mortgage" and now as a pretended "purchase of the trust estate."

Of course, if the Trust Company was strictly a mortgagee and not a trustee, it could avoid liability for the wrongs committed and admitted, with the defense that the duties of a mortgagee extended only to the loaning of money and not to the maintainance of the trust estate. After the mortgage theory was destroyed by the first decision of the Supreme Court of Indiana, then the "purchaser" theory was adopted. Of course if the Trust Company purchased the property and Mrs.

Rooker sold it with no conditions except price and terms of payment then Mrs. Rooker would have difficulty in establishing that she continued to have a right to complain of the waste of property by the person to whom she had sold. If the theory was accepted that Mrs. Rooker had sold the trust property to the Trust Company with no conditions except as to price and terms of payments, so that she no longer had any interest in the trust estate then it is obvious that a Court might proceed without notice to Mrs. Rooker to hear and determine matters of most vital concern affecting the trust property. And this the Hamilton Circuit Court is now doing in disregard both of the jurisdiction of the court and of the rights of Mrs. Rooker and her husband under the Fourteenth Amendment of the Constitution of the United States.

It would seem apparent, therefore, that the action of the Hamilton Circuit Court of Indiana in proceeding in disregard of the jurisdiction of this court and in disregard of Mrs. Rooker's rights under the Fourteenth Amendment of the Constitution of the United States, and basing the right so to proceed upon the second decision of the Supreme Court of Indiana, presents the whole case for consideration here.

FEDERAL QUESTIONS PRESENTED TIMELY

It is not now too late for Dora E. Rooker and William V. Rooker to insist that they have an interest in the affected estate which is competent to give them that standing before the law which will entitle them to their day in court on issues affecting the trust estate and their interest therein. The law's definitions of the relations which exist (1) between a trustee and *cestui que trust* and (2) between a *cestui que trust* and the trust estate are definite. In this case they were irrevocably fixed by the first decision of the Supreme Court of Indiana.

On the second appeal to the Supreme Court that tribunal refused to consider the plaintiff's; challenge of the defendants' counter-claim as being unlawful. This refusal by the Supreme Court of Indiana was stated in express terms.

This Court has held that where the Supreme Court of a state refuses to consider a part of a case, there is a denial of the equal protection of the law and a taking of property without due process of law in contravention of the Fourteenth

Amendment of the constitution of the United States and that in such circumstances, the Federal question is presented timely if it be presented in a petition for rehearing.

Mr. Justice Holmes speaking for the Court to this point in Saunders v. Shaw, 244 U. S. 317; 61 Law Ed. 1163, said: "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough—but when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infract on of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles 227 U. S. 278; 57 Law Ed. 510 It happens that shortly after the Supreme Court had declined to entertain the petition for a rehearing, the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more we could have done."

In the instant case the plaintiffs went farther than was required by the rule as Mr. Justice Holmes has stated it. Here, too, the assignment of errors presented to the Chief Justice of the Supreme Court of the State, when he allowed the writ of error, set up the Federal question. The assertion of the claim was repeated and reiterated when the Circuit Court, on the remand, acted in contravention of the Constitutional rights of Dora E. Rooker and William V. Rooker.

FEDERAL RIGHT ASSERTED

Dora E. Rooker and William V. Rooker contend that their right to come to this court is a Federal right which may be

specially set up and claimed and that when such right is specially set up and claimed within the terms of the judicial code, it raises a Federal question which this court will determine with its own standards of inquiry and judgment; that such Federal question when properly presented upon the record, as was done in the Hamilton Circuit Court in these proceedings, should have halted the State Court. The issue was tendered with a plea in abatement challenging the right of the Circuit Court to proceed further in the face of the steps being taken to have the judgment of the Supreme Court of the State reviewed by the Supreme Court of the United States. There was a demurrer to this plea in abatement and the demurrer admitted the truth of the averments in the plea. The Court sustained the demurrer and rendered judgment accordingly. Thus it became a judgment of law upon admitted facts in the Circuit Court that the Federal right which was specially set up and claimed could be disregarded by the State Court. This Court frequently has held, notably in removal cases, that the assertion of the Federal right of removal ousted the jurisdiction of the State Court and that it was for the Federal Court to determine whether the assertion of the Federal right had been timely and providently made.

Kern v. Huidekoper, 103 U. S. 485; 26 Law SS. 354.

The right of Dora E. Rooker to address her appeal to this Court for the protection of her rights under the constitution was inchoate from the time this controversy began Even before that event occurred, the constitution of the United States attended her agreements with the trustee just as the sovereignty of a vessel goes with its flag and that constitution was the supreme law of the land. The attendance of this law upon the citizen and his property is a like effective whether the form of attendance be inchoate or vested.

Rose v. Himely, 4 Cranch 241; 2 Law Ed. 608.
Gelston v. Hoyt, 3 Wheat, 246; 4 Law Ed. 381.
Cherokee Nation v. Georgia, 5 Pet. 1; 8 Law Ed. 25.
Hickey's Lessee v. Stewart, 3 How. 750; 11 Law Ed. 814.
Williamson v. Berry, 8 How. 495; 12 Law Ed. 1170.
Tennessee v. Davis, 100 U. S. 257; 25 Law Ed. 648.
Struader v. West Virginia, 100 U. S. 303; 25 Law Ed. 664.
In re Neagle, 135 U. S. 1; 34 Law Ed. 99.

THIS COURT WILL PROTECT ITS JURISDICTION

This court will defend its own jurisdiction and determine all questions which affect it.

Re Chetwood 165 U. S. 443; 41 Law Ed. 782.

United States v. Shipp 203 U. S. 563; 51 Law Ed. 319.

In re McKenzie 180 U. S. 536; 45 Law Ed. 657.

United States v. Shipp 203 U. S. 563; 51 Law Ed. 319..

The Federal Statute concerning bonds on Writs of Error seems to contemplate two forms of bond, viz, (1) those which are addressed only to the judicial side of the Court and (2) those which are addressed to both the judicial and the administrative sides of the Court. The first form of bond transfers the jurisdiction of the case from the Court below to this Court. The second form of bond transfers the jurisdiction, also, and then reaching further stops the execution of the judgment below. Writs of execution are purely sequential in their nature. They may issue and be enforced after the term. They may issue and be enforced in circumstances where the jurisdiction of the court over the parties and the subject matter has ceased, except as each court has control of its own writs to the exclusion of all other Courts, so long as there has not been a *supersedeas*. The statute concerning *supersedeas* provides:

Sec. 1007, R. S. In any case where a Writ of Error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of (or) error, by lodging a copy thereof for the adverse party in the Clerk's office, where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his Writ of Error as aforesaid, give the security required by law within sixty days after the rendition of such judgment or afterward, with the permission of a justice or judge of the appellate Court. And in such cases, where a Writ of Error may be a *supersedeas*, executions shall not issue until the expiration of ten days (6 Fed. Stats. Ann., 2d ed., p. 198; 3 U. S. Comp. Stats. 1916, sec. 1666; 18 Stats 318).

We do not here present the question of *supersedeas* on appeal, because this is not an appealed case. There can be no

process of appeal on the removal of a case to this court from a State Court. The process of appeal seems to be confined to the removal of a case in Chaucery from an inferior Federal Court to a higher one. It would therefore not be perment to set out the statutes concerning *supersedeas* on appeal, but we may make reference to the statute, sec. 1012 R. S.; sec. 1673 U. S. Comp. Stat. 1918.

The difference between a bond without *supersedeas* and a *supersedeas* bond is prescribed by statute to-wit:

Sec. 1000 R. S. Every justice or judge signing a citation on any Writ of Error, shall, except in cases brought up by the United States, or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a *supersedeas* as aforesaid (sec. 1660 U. S. Comp. Stat. 1918).

An exposition of these statutes has been made frequently. Among the pertinent cases we cite:

Kitchen v. Randolph, 93 U. S. 86; 23 Law Ed. 810.

Doyle v. Wisconsin, 94 U. S. 50; 24 Law Ed. 64.

Omaha Hotel Co. v. Kountze, 107 U. S. 378; 27 Law Ed. 609.

The Belgenland etc., 108 U. S. 153; 27 Law Ed. 685.

Hovey v. McDonald, 109 U. S. 150; 27 Law Ed. 888.

Peugh v. Davis, 110 U. S. 227; 28 Law Ed. 127.

Foster v. Kansas, 112 U. S. 201; 28 Law Ed. 629.

Covington Stock Yards Co., v. Keith, 121 U. S. 248; 30 Law Ed. 914.

Spraul v. Louisiana, 123 U. S. 516; 31 Law Ed. 233.

Danville v. Brown, 128 U. S. 503; 32 Law Ed. 507.

Knox County v. Harshman, 132 U. S. 14; 33 Law Ed. 249.

In re Claasen, 140 U. S. 200; 35 Law Ed. 409.

Hudson v. Parker, 156 U. S. 277; 39 Law Ed. 424.

Kingman & Co. v. Western Mfg. Co., 170 U. S. 675; 42 Law Ed. 1192.

Mutual Life Ins. Co. v. Phinney, 178 U. S. 327; 44 Law Ed. 1088.

In re McKenzie, 180 U. S. 536; 45 Law Ed. 657.

Title Guaranty etc. Co. v. United States etc., 222 U. S. 401; 56 Law Ed. 248.

American Surety Co. v. Schultz, 237 U. S. 159; 59 Law Ed. 892.

That the action of the Hamilton Circuit Court in making the lease to West and the pretended sale of the Marion County land to the Triangle Realty Company, and thereby turning over to the Trust Company the possession and use of the lands of the trust estate was a material impairment of Mrs. Rooker's rights is demonstrated with the sixth and seventh findings of the court in the judgment last affirmed by the Supreme Court of Indiana. (*Supra:* Opinion Supreme Court of Indiana). These findings were as follows:

"Sixth: That since the execution of said Warranty deeds and said memorandum the plaintiff, Dora E. Rooker, has continued in possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the plaintiffs William V. Rooker and Dora E. Rooker, have continued in possession of and farmed all of the real estate situated in Marion County, Indiana, and are now in possession thereof.

"Seventh: That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff, Dora E. Rooker, has received all of the proceeds arising out of the Hamilton County real estate and has not at any time rendered an accounting to the Fidelity Trust Company, trustee, and the plaintiffs, William V. Rooker and Dora E. Rooker, have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company, trustee."

The trust deeds and agreement under which these rents and profits were reserved to the *cestuis que* trust were executed October 11, 1909. The judgment of the Hamilton Circuit Court, quoted *supra*, was rendered December 21, 1918. It thus appears that for more than nine years the parties with a practical construction and exposition of their contract had declared that the rents and profits of these lands did not go to the trustee. It is obvious that the instruments should have been so written. The purpose was to hasten, rather

than delay, the liquidation of the estate and the execution of the trust. If the trustee had been given the rents and profits of the land—the court will note that there is no provisions in the deeds or agreements that the trustee ever shall account for any rents and profits—then the trustee could have slumbered forever and the trust never have been closed. The parties were in accord for so many years on the subject that the rents and profits and the possession pending sale belonged to the *cestuis que trust.* This practical construction and exposition of the contracts became the law of the contracts, binding on the parties and conclusive on the court under the rule of reason.

Old Colony Trust Co. v. Omaha, 230 U. S. 100; 57 Law Ed. 1410.

The leasing of the land to West falls within the prohibition of the law.

Mc Veigh v. United States, 11 Wall 259; 20 Law Ed. 80.

Windsor v. McVeigh, 93 U. S. 277; 23 Law Ed. 916.

Reynolds v. Stockton, 140 U. S. 254; 35 Law Ed. 464.

Hovey v. Elliott, 167 U. S. 407; 42 Law Ed. 215.

The Indiana statute concerning appeal bonds which will be a *supersedeas* as to rents and profits and to use and possession of real estate specifically confines bonds of that class to cases where the judgment is "for recovery of real property or the possession thereof" and the appeal is taken by a "party against whom the judgment for recovery is rendered." There was no issue in this case against Dora E. Rooker and William V. Rooker "for the recovery of real property or the possession thereof," nor was there any recovery against them on any such issue. The money judgment in this case embraces no item representing rents and profits. There is an extensive bill of particulars filed with the counter-claim which states every item upon which recovery was sought and not one of these items relates to rents and profits or possession. If the usual appeal bond had been given to act as a supersedeas in this case on going from the Hamilton Circuit Court to the Supreme Court of Indiana, that bond would not have covered more than the issues in the case and it would not have had

any effect as to the possession or rents and profits of the land. The Indiana Statute is as follows:

"Sec. 679, 1 Burns R. S. 1914. When an appeal is taken during the term at which judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, with such penalty and surety as the Court shall approve and within such time as it shall direct payable to the appellee, with condition that he will duly prosecute his appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against him; and if the appeal is taken from a judgment for the recovery of real property, or the possession thereof, by the party against whom the judgment for the recovery is rendered, then the condition of the bond shall further provide that the appellant shall also pay all damages, which may be sustained by the appellee for the *mesne* profits, waste or damage to the land during the pendency of the appeal; and if from a judgment for the recovery or return of personal property, or for such property or its value, then that if he deliver or return the property he will also pay the reasonable value of its use and any damage it may sustain during the pendency of an appeal. The transcript shall be filed in the office of the Clerk of the Supreme Court within sixty days after filing the bond."

Mitchell v. Gregory 94 Ind 363.

McKinney v. Hartman 143 Ind 224.

These interpretations show, if there could be any question as to the meaning of the Statute, that the possession and use of real estate must be in issue and must have been against the appellants as the consideration for their supersedeas bond in respect of the possession and use of real estate on appeal. It would seem to follow that the subsequent proceedings by the Trust Company to recover the possession and rents and profits were actions on the trust contract which they had caused to become merged in the judgment which was pending on appeal. Clearly this was a splitting of causes of action and conduct of that sort is so opprobious to the law that while the appeal is pending the lower court cannot resume jurisdiction of cases which declare upon the cause of action merged in the original judgment and should the lower court assume

to exercise an authority of that sort pending the appeal the proceedings below would be *coram non judice* and void.

Ruschaupt v. Carpenter 63 Ind 359.

Leech v. State ex rel Wysor 78 Ind 570.

Ex Parte Sweeney 131 Ind 81.

Lowery v. State Life Ins. Co. 153 Ind 100.

Partlow v. State (Ind Sup) 134 N E - Adv Sheets.

"It is a universal rule that the perfecting of an appeal transfers the cause to the Appellate Court and that it remains there until it is remitted to the trial court by the sending down of the mandate, Credit Co. v. Ark. Cen. Ry. Co. 128 U. S. 258, 32 Law Ed 448; Aspen Smelting Co. v. Billings 150 U. S. 31, 36, 37 Law Ed 986; Kingman v. Western Mfg. Co., 170 U. S. 675, 678, 680, 42 Law Ed. 1192."

See Omaha Electric Light & Power Co. v. City of Omaha 216 Fed. 848; Old Colony Trust Co. v. City of Omaha 230 U. S. 100; 57 L E 1410; Omaha Electric Light & Power Co., Omaha 230 U. S. 123; 57 Law Ed 1419.

THE LOWER COURT IS PROCEEDING JUDICIALLY

Petitioners contend that the Hamilton Circuit Court, pretending to act under the mandate of the Supreme Court of the State in this case is proceeding juridically. We employ this word "juridically" to distinguish the powers which the court is exercising from those powers which represent the "administration" side of the court.

An appeal without a supersedeas bond transfers the jurisdiction and puts an end below to juridical proceedings. But such a bond does not stop the administrative side of the court below. On that side of the court the state may proceed to execute the judgment.

The Supersedeas suspends both the administrative and judicial functions of the Court below and execution is an administrative function.

Indiana Statutes concerning the enforcement of judgments and decrees are embraced within the title "Executions" of "an act concerning proceedings in civil cases," approved April 7, 1881. (Acts 1881 pp 328-351) and so far as they are relevant here they are set forth in 1 Burns' R S 1914, as follows:

"Sec. 716 (Sec. 479 Act 1881): Writs of execution, as now used for the enforcement of judgments, are modified in conformity to this Act; and any party in whose favor judgment has been heretofore, or shall hereafter be, rendered may, at any time within ten years after the entry of judgment, proceed to enforce the same as provided in this act."

"Sec. 718 (Sec. 482 Act 1881): There shall be three kinds of executions—one against the property of the judgment debtor, one against his person, and one for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same; and executions may be issued to sheriffs of different counties at the same time; but the plaintiff shall pay the costs upon all executions not necessary to the collection of his judgment."

"Sec. 724 (Sec. 485 Act 1881): The execution must issue in the name of the State, and be directed to the sheriff of the County, sealed with the seal and attested by the clerk of the Court. It must intelligibly refer to the judgment, stating the Court where and the time when rendered, the names of the parties, the amount, if it be for money, and the amount actually due thereon, and shall require the sheriff substantially as follows:

"*First:* If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment out of the property of the debtor subject to execution.

"*Second:* If it be against real or personal property in the hands of personal representatives, heirs, devises, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment out of such property.

"*Third:* If it be against the body of the judgment debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the County until he shall pay the judgment or be discharged according to law.

"*Fourth:* If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto; and may at the same time require the sheriff to satisfy any costs, damages, or rents and profits recovered by the same judgment out of the property of the party against

whom it was rendered subject to execution, and the value of the property for which the judgment was recovered to be specified therein, if a delivery thereof cannot be had; and shall, in that respect, be deemed an execution against property.

"Sec. 795 (Sec. 600 Act 1881): The following real estate shall be liable to all judgments and attachments, and to be sold on execution against the debtor owning the same, or for whose use the same is holden, viz:

"*First:* All lands of the judgment debtor, whether in possession, remainder or reversion.

"*Second:* Lands fraudulently conveyed with intent to delay or defraud creditors.

"*Third:* All rights of redeeming mortgaged lands; also, all lands held by virtue of any land-office certificate.

"*Fourth:* Lands, or any estate or interest therein, holden by any one in trust for or to the use of another.

"*Fifth:* All chattels real of the judgment debtor."

In the Statutes of Indiana concerning executions the serial numbers of sections in 1 Burns R S 1914, begins with 716 and ends with 867. It appears, thus, that there are 151 sections. Each of these section had a sub-title separate and distinct from all others. It would encumber the record to repeat even the sub-titles here. It would require many pages of this record to reproduce the sections entirely. The points we wish to make by this reference to the statutes concerning executions are:

(1) That they are addressed to the administrative side of the Court rather than to the judicial.

(2) That in not one of them is there provision made for a writ of assistance.

It would, therefore, appear that the writ of assistance is a process not provided for by the statutes concerning executions, nor is it within the contemplation of those statutes which are addressed to the administrative side of the court. On the contrary it is the general law of the state, as distinguished from the statutory law which makes the writ of assistance a process obtainable only upon petition, with notice, addressed to the discretion of the court in the exercise of the judicial

powers. Nor will the writ issue in any case where an execution is allowable. The writ of assistance is allowed in cases where there has been a judicial sale, but not upon execution, as by an executor, administrator, guardian, trustee or commissioner, or after sale on a decree of foreclosure when the year for redemption has expired without a redemption having been made. And where there is an unexplained delay in applying to the court for a writ of assistance the petition for the writ will be denied and the parties left to proceed in ejectment.

Gilliland v. Milligan 144 Ind 154.

Roach v. Clark 150 Ind 93.

Emerick v. Miller 159 Ind 317.

The purpose of supersedeas being to stop execution of the judgment or decree appealed from it is addressed as well to the administrative side of the court as well as to the judicial side.

If it were true that supersedeas should always attend an appeal or writ of error then it would follow that the judicial powers of the lower court never were suspended by the transfer of jurisdiction to this court with a bond other than a supersedeas. But such is not the law. When this court acquires jurisdiction of a case that jurisdiction is not divisible nor fragmentary, nor does it depend up the acquiescence, concurrence or participation of any other tribunal and the jurisdiction here is both complete and exclusive. The fact that jurisdiction here may not stop execution below without a supersedeas bond may not be ascribed to any frailty in jurisdiction here but rather to the fact that execution below is not juridical but is administrative, neither involving any further exercise of judicial power nor indeed the further presence of the parties in court. In this respect that which is true of this court was likewise true of the Supreme Court of Indiana, as compared with the Hamilton Circuit Court. When the jurisdiction of this case on appeal under the Indiana Practice Act (there is no writ of error in Indiana) vested in the Supreme Court of Indiana, at that moment all judicial power was at an end in the lower court and it could determine no juridical issue while the Supreme Court had jurisdiction, although the State might in the meantime and in the absence of supersedeas,

execute the affected judgment. It would seem to follow from these premises that every juridical issue determined and every judicial order made by the Hamilton Circuit Court pending the appeal in the Supreme Court of Indiana was *coram non judice* and void.

Ruschaupt v. Carpenter 63 Ind 359.

Leech v. State ex rel Wysor, 78 Ind 570.

Ex Parte Sweeney, 131 Ind 81.

Partlow v. State (Ind. Sup.) 134 N E - Adv Sheets.

Lowery v. State Life Ins. Co. 153 Ind 100.

The principle is further illustrated with the rule that a judgment becomes final at the end of the term in which it was rendered and that, thereupon, the parties cease to be before the court for the purpose of juridical issues.

Brooks v. Burlington etc. Co. 102 U. S. 107; 26 Law Ed 91.

Bronson v. Schulten, 104 U. S. 410, 415; 26 Law Ed 797, 799.

Wetmore v. Karrick, 205 U. S. 141; 51 Law Ed 745.

Board v. Brown 14 Ind 191.

Jenkins v. Corwin 55 Ind 21.

Nor can new juridical issues be introduced in the court below after judgment which involves matters pending in the appellate tribunal.

Ex Parte Chetwood 165 U. S. 443; 41 Law Ed 782.

Partlow v. State (Ind Sup) 134 N E - Adv. Sheets.

Ableman v. Booth 21 How 506; 16 Law Ed 169.

All these rules correlate with the principle that an appellate review is the continuation of the original litigation rather than the commencement of a new action.

Cohens v. Virginia 6 Wheat, 264; 5 Law Ed 262.

Nations v. Johnson 24 How 195, 205, 16 Law Ed 628, 632.

Ex Parte Chetwood 165 U. S. 443, 41 Law Ed 782.

The appellate jurisdiction of the federal courts is so designated in order to distinguish that jurisdiction from the original jurisdiction. The appellate jurisdiction is subject to rules of procedure prescribed by Congress. These rules of procedure may, and they do, authorize, the appellate jurisdiction to attach upon a petition for removal from a state court to an

inferior federal court, as well as upon appeal, writ of error, or certiorari issued out of this court to a state court. Therefore, the effect of the transfer of jurisdiction upon removal from a state court to an inferior federal court, may be employed to illustrate the manner, time and extent to which the change of jurisdiction from one court to the other becomes effective, and the impotency of the state court in the premises after the removal has been consummated.

Martin v. Hunters' Lessee 1 Wheat 304; 4 Law Ed 97.
Removal Cases 100 U. S. 457; 25 Law Ed 593.
Tennessee v. Davis 100 U. S. 257; 25 Law Ed 648.
Strauder v. West Virginia 100 U. S. 303; 25 Law Ed 664.
In Re Neagle 135 U. S. 1; 34 Law Ed 99.

The jurisdiction of a subject and of the parties to it by one court excludes all other courts and this is true particularly as between federal courts and state courts. In the case of this court on writ of error, appeal or certiorari the exclusion is a matter of right.

Wabash v. Adelbert College 208 U. S. 38, 54; 52 Law Ed 379, 386.
Moran v. Sturges 154 U. S. 256; 38 Law Ed 981.
Porter v. Sabin, 149 U. S. 473; 37 Law Ed 815.
Ex Parte Tyler, 149 U. S. 164; 37 Law Ed 689.
Ex Parte Johnson, 167 U. S. 120; 42 Law Ed 103.

CONCLUSION

In consideration of the premises these petitioners say that the case is not all here and that all of it should be brought here; that in this respect there is a diminution of the record; that the writ of certiorari in aid of the writ of error should issue out of this Honorable Court to the Hamilton Court of Indiana commanding and requiring the certification to this court of all the proceedings of that court done on and since October 26, 1921, and in anticipation of the jurisdiction of the court and that justice be done.

Respectfully Submitted

William Velpeau Rooker
Attorney for Petitioners.

Floyd G. Christian
Ralph H. Waltz,
of Counsel.

The respondents in the cause above entitled are hereby notified that on the first Monday in October 1921, or as soon thereafter as counsel can be heard, the said petitioners will move to submit their petition and brief in the premises to the Supreme Court of the United States, in the Capitol at Washington, D. C., and will ask that the Writ of Certiorari of said court be issued and directed to the Hamilton Circuit Court of Indiana, commanding and requiring the certification to the Supreme Court of the United States of all the proceedings of said Hamilton Circuit Court done on and since the 26th day of October, 1921, and in anticipation of the jurisdiction of the Supreme Court of the United States, and that justice be done.

William Velpeau Rooker
Attorney for Petitioners

Received copy of the foregoing notice, petition and brief this Second day of June, 1922.

Attorney for Respondents

NOV 8 1
WM. R. STA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 285

DORA E. ROOKER, WILLIAM V. ROOKER,
Plaintiffs in Error.

v.

FIDELITY TRUST COMPANY, IN ITS CORPORATE CAPACITY PROPER,

FIDELITY TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER,
Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

WILLIAM VELPEAU ROOKER,
Attorney for Plaintiffs in Error.

FLOYD G. CHRISTIAN,
RALPH H. WALTZ,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 285

DORA E. ROOKER, WILLIAM V. ROOKER,
Plaintiffs in Error.

v.

FIDELITY TRUST COMPANY, IN ITS CORPORATE CAPACITY PROPER.
FIDELITY TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER,
Defendants in Error.

STATEMENT OF THE CASE.

We controvert the statement of the case made by defendants in error, as incomplete and misleading, and therefore make this statement, viz.:

Suit by Dora E. Rooker and William V. Rooker to redeem the trust estate of Dora E. Rooker from a recalcitrant trustee who has, with a written instrument, repudiated the trust and renounced the office of trustee under the deed of appointment. The case was tried on an amended complaint, which asked that there be an accounting; that an upset date be named by the court in which any amount found due be paid to the former trustee; that the court take over the trust estate with the appointment of a receiver who should perform the duties arising in the situation.

The prayer for relief stated in the amended complaint was in these words, towit:

"Wherefore, these plaintiffs demand judgment, that an accounting be had of the extent of the interest of said Fidelity Trust Company in and to said property and that a reasonable time be fixed in which said indebtedness may be paid, and that in the meantime a receiver be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement, and to perform with respect thereto such duties as the court may from time to time direct and that damages sustained by said Dora E. Rooker because of the non-performance of said contract be ascertained and that she be given judgment accordingly; that the said co-defendants of said Fidelity Trust Company be required to set up their several respective interests in the premises or on default that they be forever barred and shut out and that the clerk of the court upon the rendition of such judgment be ordered and directed to enter of record the release and satisfaction of each and every such lien and incumbrance and plaintiffs pray for all proper relief."

Printed transcript, page 16.

There had been an original complaint filed from which it later was learned, were omitted certain parties who upon the county records appeared to be the holders of mechanics and other liens not released of record. The purpose of the amendment was to quiet the title of the property as against these unlawful claims, so that upon a sale by the receiver or otherwise the title would not be clouded. The record in the first case shows that, although duly summoned, none of these newly made defendants appeared and as against them the title was cleared.

Attached to the complaint and made exhibits with it were the defendants' written instrument of repudiation, marked "Exhibit No. 1," and also the written memorandum of the trust agreement of October 11, 1909, marked "Exhibit A."

Printed transcript, pages 16-22.

Finally in response to this amended complaint THE FIDELITY TRUST COMPANY answered, setting up the trust agreement, Exhibit A, *supra*, and the deeds founded thereon, which agreement and deeds THE FIDELITY TRUST COMPANY averred to be a mortgage which the trust company asked be foreclosed; that the trust company be allowed judgment in a sum which it declared to be owing it and that there be foreclosure of the mortgage and sale of the trust estate.

Printed transcript, pages 22-46.

Such proceedings were thereafter had as that, on December 13, 1913, judgment was rendered in favor of THE FIDELITY TRUST COMPANY in the sum of $23,201.44 and the foreclosure of the trust deed as a mortgage with an order of judicial sale by the sheriff of each of the counties in which lands of the trust estate were situate.

Printed transcript, pages 61-65.

The judgment was executed by sale of the Marion County real estate to THE FIDELITY TRUST COMPANY for $4,000 and sheriff's deed was executed therefor.

Printed transcript, pages 281-282.

The judgment was further executed with the sale of the Hamilton County real estate to THE FIDELITY TRUST COMPANY for $20,864.14 and sheriff's deed was executed therefor.

Printed transcript, pages 278-280.

On May 15, 1914, THE FIDELITY TRUST COMPANY claiming to have purchased an outstanding mortgage on the Hamilton County lands, sued Dora E. Rooker and William V. Rooker, seeking personal judgment on the mortgage debt and a decree of foreclosure. The complaint in that suit is in the record.

Printed transcript, pages 434-440.

Such proceedings were therefore had as that on October 5, 1915, the Supreme Court of Indiana reversed the judgment of the Hamilton Circuit Court and remanded the case for new trial.

Rooker v. Fidelity Trust Company, 185 Ind. 172.

In this opinion the Supreme Court of Indiana set forth

at full length the covenants of the trust agreement of October 11, 1909, and the deeds executed by Dora E. Rooker and William V. Rooker on the faith and for the consideration of that agreement. (185 Ind., pp. 172-181.)

The Supreme Court of Indiana in that opinion recited, also, the history of the litigation. (185 Ind. 172, pp. 181-188.)

The Supreme Court of Indiana in that opinion stated also the nature and qualities of the controversy between the parties in respect of this trust agreement and the deeds executed on the faith and for the consideration of that agreement. For convenience, we state that part of the Supreme Court's opinion beginning 185 Ind. at the foot of page 181, towit:

"Appellee entered a general denial to the amended complaint and also filed an amended counter claim, denominated a cross-complaint, in which it alleged the payment of large sums of money by it in accordance with the trust agreement and for the protection of its rights thereunder. It further charged waste on the part of appellants and asked that an accounting be had; that the deeds above described be declared a mortgage and foreclosed, and that a receiver be appointed to take charge of the property during the year of redemption.

"We deem it unnecessary to make extended reference to the several motions addressed by appellants to this pleading, nor to the ten paragraphs of special and partial answer thereto. It is sufficient to say in general: (1) That they present appellants' theory that the instruments above set out constitute a trust agreement which, it is charged, has been violated and abused in the particulars set forth; and (2) That they oppose the position taken by appellee that the conveyances, while in the form of trust deeds, in fact constitute a mortgage which was executed to appellee as security for the repayment of advancements made by it. The issues were closed by an answer in general denial to the counter-claim and by reply in general denial to the several paragraphs of special and partial answer filed by appellants.

The cause was tried by the court which, at request of appellants, made a special finding of facts and also a general finding, in which it found against appellants on the issues presented by their amended complaint and in favor of appellee on the issues joined on its amended counter-claim.

"The court thereupon rendered judgment, foreclosing the mortgage and directing a sale of the property in question, and at the same time rendered personal judgments which determined the matter of costs as between the Illinois Surety Company, Lilly and Stalnaker, Daniel I. Neher, and appellants. None of the parties last above mentioned, other than appellants, are now before this court and as this is a vacation appeal, appellee insists that it should be dismissed without an inquiry into the merits for the reason that all the parties to the judgment below are not named in the assignment of errors in this court. This appeal, however, is from the judgment *in rem* rendered on the issues which involve the construction of the instruments herein set out and does not question the personal judgments which determined only certain matters of costs. No parties, other than appellants and appellee, are affected by the judgment from which this appeal is prosecuted, and they are the only necessary parties to the proceeding.

Zimmerman v. Gaumer (1898) 152 Ind. 552, 554, 53 N. E. 829;

Lowe v. Turpie (1896), 147 Ind. 652, 692; 44 N. E. 25; 47 N. E. 150; 37 L. R. A. 233.

"The principal question to be determined here is the proper construction to be given to the instruments which are made the basis of this action. In support of its contention that the deeds in question in fact constitute a mortgage, appellee relies on the following propositions of law:

"(1) That different instruments, executed at the same time, relating to the same matter constitute one transaction and must be read and construed together.

Knepper v. Eggiman (1911), 177 Ind. 56, 62; 97 N. E. 161;

Schmueckle v. Waters (1890), 125 Ind. 265, 267; 25 N. E. 281.

"(2) That any conveyance of real estate, whatever its form, which is in fact executed for the purpose of securing a debt, is a mortgage.

Sinclair v. Gunzenhauser (1912), 179 Ind. 78, 121; 98 N. E. 37; 100 N. E. 376;

Brown v. Follette (1900), 155 Ind. 317, 321; 58 N. E. 197;

Lowe v. Turpie, supra.

"(3) That the power of sale contained in the instruments here involved does not exclude the right of foreclosure by judicial proceeding.

Sinclair v. Gunzenhauser, supra;

Eaton, Etc., R. Co. v. Hunt (1863), 20 Ind. 457, 464; Sec. 4029 Burns R. S. 1914; Sec. 2986 R. S. 1881.

"There can be no doubt that the general rule which precludes the admission of parol or extrinsic evidence to vary or contradict the terms of a written instrument is subject to the exception that a deed absolute on its face may, in equity, be shown by parol evidence to have been intended to have the effect of a mortgage merely. This exception has found frequent expression in the decisions of this and the appellate court, and its existence as an established rule is conceded by appellants. It is their contention, however, that it has no application where, as in this case, the deed or other instrument of conveyance is but one element in a transaction which has been reduced to writing in its entirety and is evidenced by a memorandum embodying all of its terms. This position is well taken. As recently stated by this court, where there is a formal written contract which appears to be complete within itself, it will be presumed to be the repository of the final intentions of the parties in regard to the subject matter of this agreement. Oral declarations relative thereto will be disregarded and

the rights of the parties determined as they appear from the written instrument.

Strebel v. Bligh, 183 Ind. 537; 109 N. E. 45.

"The instruments now before us embody but one contract, the terms of which are stated in the memorandum above set out, and the legal force and effect of the trust deeds, as they are termed, depend upon the intention of the parties as it is evidenced by said memorandum. From the terms of this instrument, there can be no doubt that it was one purpose of appellants to provide therein for the repayment to appellee of such sum or sums as it should advance to them or expend in their behalf. To that extent the instruments may be construed as affording security to appellee for money advanced, but not every instrument which affords security is a mortgage, nor is it the primary or sole purpose of the contract in this case to insure the payment of appellees' claim and no others. Appellees were the owners of a considerable amount of real estate, on a part of which certain improvements were contemplated and were in fact under course of construction. The expense of these improvements proved greater than was anticipated and the claims of creditors were being pressed. It became evident that, to prevent great sacrifice or loss to the estate, provision had to be made for the completion of the work in hand, for the proper maintenance of the property until disposed of and for the payment of debts owing by appellants. To that end the agreement evidenced by the instruments here in suit was entered into and all parties thereto obligated themselves, their representatives and assigns, to the proper performance of its terms. The evident purpose of its execution and the language used by the parties makes it clear that at the time it was entered into the agreement was treated as a trust and not as a mortgage.

"Reference may here be made to the cases of Taylor v. Cornelius (1869), 60 Pa. St. 187, and Woodruff v. Robb (1850), 19 Ohio 212, to which our attention is called by appellee as decisive of the questions here presented. Without reviewing these decisions at length, it may be noted that

in each case the instrument in suit contained a condition of defeasance which provided, in substance, that on payment of certain debts, the property or so much as remained thereof, should be reconveyed to the grantor in the trust deed. In the case at bar, no provision is made for the reconveyance to appellants of the real estate involved or any part thereof. The fair construction of the instruments before us is that an effort on the part of appellants to provide for the conversion of their property into money in order that their just debts might be paid. AS SUCH IT IS A CONTRACT GOVERNED BY THE LAW OF TRUSTS. True, provision is made for the advancement of certain sums of money by appellee to appellants or on their order, but it is apparent that the advancements so made do not supply the entire consideration for the execution of the contracts and they are to be included among debts to be paid out of the funds realized from the sale of the lands in question. If, by reason of the improvements contemplated or other circumstances, the proceeds realized from the sale of said lands be more than sufficient to pay all obligations, then the residue of such proceeds is to go to appellant Dora E. Rooker, her heirs and assigns. To that extent they may be said to possess an equitable interest in the estate and their position with reference thereto is somewhat analogous to that of other creditors, but nowhere in the instruments of conveyance is there a contingency expressed or implied, on the happening of which appellants, or either of them, would be entitled to a reconveyance of any part of said lands.

"The distinction between an absolute deed of trust and a deed of trust in the nature of a mortgage is clearly stated in Hoffman, Burneston & Co. v. Mackall (1885), 5 Ohio St. 124, 64 Am. Dec. 637, and the decision in that case supports our construction of the instruments here in controversy. We quote from the opinion (p. 130) as follows: "There is a manifest and well settled distinction between an unconditional deed of trust, and a mortgage or deed of trust in the nature of a mortgage. The former is an abso-

lute and indefeasible conveyance of the subject matter thereof, for the purpose expressed; whereas the latter is conditional and defeasible. A mortgage is the conveyance of an estate, or pledge of property, as security for the payment of money, or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of a mortgage, is a conveyance in trust by way of security, subject to a condition of defeasence, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to sell the land in case of a default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. The court concludes in language applicable here, that it 'is manifest from this distinction that the conveyance in controversy in this case was not a mortgage or deed of trust in the nature of a mortgage but an absolute deed of trust.'

"The judgment of the trial court in the case at bar is contrary to law and must be set aside. Judgment reversed, with instructions to sustain appellants separate and several motions for a new trial, and for further proceedings in accordance with this opinion."

Rooker v. Fidelity Trust Co., 185 Ind. 172, 181-188.

MARION CIRCUIT COURT PROCEEDINGS.

When the first appeal was perfected from the Hamilton Circuit Court to the Supreme Court of Indiana, The Fidelity Trust Company proceeded to execute its judgment with the sale of the lands of the trust estate. At these sales The

Fidelity Trust Company became the purchaser. As against these sales Dora E. Rooker and William V. Rooker, under the laws of Indiana, had one year in which to redeem the property, from the date of the sheriff's sales. Thereupon Dora E. Rooker and William V. Rooker began an action in the Marion Circuit Court against the sheriff of Marion County and The Fidelity Trust Company to quiet title as against that sale. At that time Louis B. Ewbank was judge of the Marion Circuit Court. The case continued pending before Ewbank until after there had been a reversal of the judgment of the Hamilton Circuit Court by the Supreme Court of Indiana. (185 Ind. 172.) Thereafter Charles E. Cox, who had been a member of the Supreme Court of Indiana at the time of the decision of this case on the first appeal, and who had participated in that decision, went off the supreme bench, upon the expiration of his term of office, and presently thereafter he appeared in Ewbank's court as attorney for The Fidelity Trust Company as trustee of the estate of Dora E. Rooker. Cox filed a cross complaint for The Fidelity Trust Company as trustee, drawn on the theory that the sale by Dora E. Rooker and William V. Rooker had been absolute. This was the first pleading, in all the litigation, filed by The Fidelity Trust Company, as trustee. There were pleas to the jurisdiction, etc., filed by Dora E. Rooker and William V. Rooker, but these were disregarded by Judge Ewbank, who held that the sale was absolute and unconditional and that Dora E. Rooker and William V. Rooker were without any interest in the trust estate and that they should be and were enjoined from asserting any interest.

At the time he heard this case and rendered this judgment, Judge Ewbank had been named as an executor of the will and thereafter as the trustee of the estate of one Malott of the city of Indianapolis. There were three of these 'executors' and 'trustees,' Judge Ewbank being the only lawyer, the other two being bank clerks. The appeal from the Ewbank judgment is still pending in the Supreme Court

of Indiana. Ewbank knew that he had been named as such executor and trustee and he knew the very great wealth of the Malott estate and that its wealth was many millions of dollars and that it had very large holdings in the stock of trust companies and of banks, all which were competent under the law to act as trustee under conventional trusts similar to the one in this case.

Some time later The Fidelity Trust Company, in its corporate capacity proper and The Fidelity Trust Company as trustee of the estate of Dora E. Rooker, appeared in the Hamilton Circuit Court and filed their joints "second amended counter claim" against Dora E. Rooker and William V. Rooker. After proceedings, the cause was submitted for trial upon answers to the amended complaint as supplemented and upon this joint "second amended counter claim" as supplemented. The theory of the Ewbank judgment was adopted in this "second amended counter claim" and at the trial of the cause the Ewbank decree was employed as the basis for the examination of witnesses, etc., but it was not formally offered to be read in evidence, and in this situation objections and exceptions were avoided. Meantime a vacancy caused by the death of Judge Harvey enabled Ewbank to secure an appointment to the supreme bench of the state. When this appeal from the second judgment of the Hamilton Circuit Court came before the supreme court, Judge Ewbank participated in its decision. Soon after the second decision of the case by the supreme court, Malott died and the probate of his will disclosed that during the period of all the proceedings in this case in the Marion Circuit Court and the Hamilton Circuit court, following the first decision by the supreme court, Ewbank had been designated as executor of said will and trustee of said estate, the trusteeship to continue for about twenty-five years hereafter. The disclosures made by the offering of this will for probate was the first knowledge Dora E. Rooker and William V. Rooker had that Ewbank was thus inchoately charged with the duty of enhancing the values of trust company stocks and that he

was so interested in having the laws of Indiana fixed to excluded *cestuis que trust* from (1) the right to redeem a trust estate from a recalcitrant trustee; (2) the right to hold a recalcitrant trustee liable for misfeasance and malfeasance in office. So soon as they learend the facts in the premises as to the interest and disqualification of Judge Ewbank, Dora E. Rooker and William V. Rooker set those facts forth in a petition for rehearing of this cause in the Supreme Court of Indiana. The petition for rehearing was filed in the court's summer vacation. When the court resumed its autumnal sittings the petition for rehearing was overruled without an opinion and thereupon these proceedings in this court were undertaken. It is a harbor of the defendants in error here that a Federal jurisdiction cannot arise upon a petition for rehearing, even where the concealment of the facts upon which the Federal jurisdiction arises has been fraudulent. Plaintiffs in error will, of course, contend that they cannot with fraud be deprived of their right to present a Federal question any more than they can with fraud be deprived of any other right. We will contend that the element of fraud is not unilateral; that fraud is not a sword or a shield, merely as the party who employs it may declare it to be; that fraud cannot be employed to impose a false jurisdiction on this court nor to defeat a jurisdiction which this court rightfully should entertain.

This thing of hanging grapes before the eyes of a hungry fox, where they will tempt his appetite, may be very high art in hunting and trapping but such conduct has no place in judicature and such art is unknown in any jurisprudence which is worthy of the name.

Where such art prevails in judicature there is a denial of the equal protection of the law and property is taken without due process.

In such a case the Federal question arises upon the record, notwithstanding it was presented properly in the petition for rehearing.

THE CONTRACT'S OBLIGATION WAS FIXED WITH THE FIRST OPINION OF THE SUPREME COURT AND IT WAS IMPAIRED WITH THE SECOND OPINION.

It is the law of Indiana, as well as of this jurisdiction, that in cases involving the interpretation and construction of a contract, that the first opinion and mandate of the supreme court (1) fixes the law of the contract, (2) establishes, immutably and forever, the remedies which attend the enforcement of the contract, and (3) becomes the obligation of the contract, (4) leaves nothing further to be determined in respect of the obligation of the contract, (5) and so far extends the rule of *res adjudicata* in respect of the obligation of the contract, as to exclude thereafter jurisdiction of any other court over the same subject by making its action, should any be attempted in the matter, *coram non judice* and void.

In a case, as in this one, where there are two conflicting opinions of the Supreme Court of Indiana, each assuming to be final, bearing upon the obligation of one and the same contract, the latter one is *coram non judice* and void; and where both such opinions appear upon the same record, the Federal question under the contract clause of the Constitution arises upon the record and need not be put in with a special plea, and it contravenes the contract clause of the Federal Constitution if it attempts to change the law of the case as fixed on the first appeal.

In such a case, where there are the two final and conflicting opinions upon one and the same state of facts, where an attempt is made to enforce the later judgment, there is a denial of the equal protection of the law and a taking of property without due process of law in contravention of the Fourteenth Amendment of the Federal Constitution.

In such a case the Federal questions arise upon the record, regardless of other ways in which they may have been presented.

Where the supreme court of a state on a second appeal of a case involving the interpretation and construction of one and the same contract avowedly denies the existence of pre-determined laws and palpably disregards the protency of established facts all for the advantage of one party and to the injury of the other, there is a denial of the equal protection of the law and property is taken without due process of law all in contravention of the Fourteenth Amendment of the Federal Constitution.

In such a case the Federal questions arise upon the record, however else they may have been presented.

THE MOTION TO DISMISS OR AFFIRM.

With their brief on the motion to dismiss or affirm, the defendants in error appear to seek either to advance the consideration of this cause upon its merits without the usual procedure applicable to that effort, or to confuse questions of jurisdiction with questions of merits, and therefore this brief is far more extensive than it should be on a clear issue of jurisdiction. In this case the first opinion held that the law which controlled the contract was the law of trusts; in the second opinion it was held that the law of trusts had no application, but that the law which controlled was that which defeated the contract altogether and made it non-enforceable as being one of those imperfect contracts which are without remedy to support them because they depend solely upon a moral obligation.

1 Williston on Contracts, Sec. 147;

Eakin v. Fenton, 15 Ind. 59;

Schnell v. Nell, 17 Ind. 29; 79 Am. Dec. 453.

As we translate their present brief it presents these points, to-wit:

1. That there is no jurisdiction on writ of error "where there is no decision against the validity of a treaty or statute of or an authority exercised under the United States, nor in favor of the validity of a statute of or an authority exercised under a state, challenges because of repugnance to the constitution treaties or laws of the United States."

2. That the decision and judgment of the state court rests firmly upon sound and settled local and general law.

3. No Federal question was ever presented, drawn into the case, or decided by the state courts.

4. The final assignment of errors was in contempt of the Supreme Court of Indiana and was disposed of without a written opinion.

5. The facts disclosed show that the case was so disposed of as to be right on the merits.

OUR COUNTER PROPOSITIONS.

The 5th point *supra* invites consideration of the merits and being coupled with other points, its presence may be to procure the placing of this case where it will be considered on its merits out of its order on the docket of this court. The brief on the merits is under way but is not completed But the issue of merits, as raised *supra*, impels their suggestion, if not presentation here, and necessarily makes this brief more extensive than it should be if it were on the jurisdiction solely.

We submit each of the following counter propositions, viz.:

1. There are three distinct Federal questions presented upon the record here, viz.: (1) The impairment of the obligation of a contract; (2) the denial of the equal protection of the law; (3) the taking of property without due process of law.

2. The jurisdiction of this court will not be defeated on the ground that the Federal questions have been obscured and in a measure hidden by the Supreme Court, when it shall be made clear that the concealment of those questions was a part of the purpose of the supreme court of the state, and when the reasons for that purpose shall be disclosed herein.

3. That the merits and the law of this case are entirely with the plaintiffs in error.

There are presented upon the record here, two conflicting opinions and judgments of the Supreme Court of In-

diana both interpreting and construing in this action one and the same contract. As noted *supra* the first of these opinions held the affected contract to be a trust agreement and its administration to be controlled by the law of trusts. The second of these opinions held the affected contract to be one wherein there had been a perfected sale of the real estate by Dora E. Rooker and William V. Rooker to the trust company upon consideration which had been discharged, so that only a moral obligation remained upon the trust company to pay Dora E. Rooker any further sum, and this obligation was exposed to the contingency that the trust company should elect to sell the property upon terms and for a price which, after satisfying the trust company, would thereafter leave anything for Dora E. Rooker. Clearly, then, the second opinion put the contract in that class known as imperfect obligations where the sole standard of performance was the conscience of the obligor.

It is the law of Indiana, as it is of this court, (1) that the first of these opinions immutably fixed the obligation of the contract and (2) that the second opinion impaired that obligation. When the law of Indiana once fixed the law of this contract, that law thereafter could not be changed because of the contract clause of the Federal Constitution.

Yazoo, Etc., Co. v. Adams, 180 U. S. 1, 14; 45 Law Ed. 395, 404;

Board of Supervisors v. Kennicott, 94 U. S. 498; 24 Law Ed. 260;

New Orleans v. Warner, 180 U. S. 199, 203; 45 Law Ed. 493, 495, 496.

It is the law of Indiana, as it is of this court, that a distinction exists between (1) the rights of a plaintiff to elect a remedy and (2) the rights of a defendant to elect a defense. Where the plaintiff sues he may bring the wrong action. He may not therefore be concluded from bringing that form of action which properly is in accord to the remedies which he is lawfully entitled to pursue. But where a defendant is challenged to assert his rights under a con-

tract he must present every defense he has because the rule of *res adjudicata* contemplates that everything will be concluded which (1) was put in issue and (2) also everything which should have been put in issue.

This action was begun by the plaintiffs in error and the defendants in error were challenged to assert all their defenses in answer to the complaint.

When this action was begun the complaint upon which the case was tried alleged that The Fidelity Trust Company had been made the conventional trustee of the estate of Dora E. Rooker. The making of the trust agreement was recited and the memorandum of the trust agreement was recited, and a copy of the memorandum was exhibited with the complaint as the statutes of Indiana require shall be done.

Sec. 368, 1 Burns R. S., 1914.

There was also exhibited with the complaint the written notice of repudiation served on Dora E. Rooker and William V. Rooker on October 28, 1912, by The Fidelity Trust Company in its corporate capacity proper and The Fidelity Trust Company as trustee of the estate of Dora E. Rooker.

Printed transcript, pp. 13-21.

It was the duty of The Fidelity Trust Company, as such defendant, at that time to set up its interest as trustee. In the alternative The Fidelity Trust Company might elect to repudiate the trust agreement and renounce its duties under the office of trustee. The latter course was elected. The trust company as trustee filed no answer. The trust company not as trustee answered the complaint with a general denial and filed a counter claim in which it set up the trust deed as a mortgage and asked that it be foreclosed. Its defense against the charges of maladministration as trustee were answered with the defense that it had no duties as trustee because the instrument under which it held was not a trust agreement but was a mortgage.

Printed transcript, pp. 22-26.

It was the duty of the trust company at that time to set up its trusteeship and defend the trust estate. The trust company elected to do otherwise. It cannot change after

the first case has gone to judgment. The issue became *res adjudicata.*

Northern Pac. R. Co. v. Ellis, 143 U. S. 458; 36 Law Ed. 504;

Great Western, Etc. Co. v. Burnham, 162 U. S. 339; 40 Law Ed. 991;

Illinois v. Illinois Central R. Co., 184 U. S. 77; 46 Law Ed. 440;

Thompson v. Maxwell, Etc. Co., 158 U. S. 451; 42 Law Ed. 539;

Thompson v. Maxwell, Etc. Co., 168 U S. 539; 42 Law Ed. 539;

Yazoo, Etc. R. Co. v. Adams, 180 U. S. 7; 45 Law Ed. 395, 404;

New Orleans v. Warner, 180 U. S. 199; 45 Law Ed. 493

It was pointed out repeatedly on the second trial in the circuit court had under the mandate of the first opinion that the new pleadings tendered and the evidence adduced were in contravention of the former opinion of the supreme court of the state.

Printed transcript at foot of page 195, 152-3, 424, 425, 218, 219, 220, 221.

These objections were carried into the motion for new trial and in the assignment of errors in the supreme court.

Printed transcript, pp. 221-224; pp. 3-7.

The action of the supreme court in denying potency to the first opinion of that court is assigned as error here.

Printed transcript, 498, Sec. 2.

In disposing of some of these objections the supreme court of the state, on the second appeal, disregarded the objections stated in the demurrer and at the trial, that the acts taken were in contravention of law of the case as settled on the first appeal, and as to the motions to strike out, etc., which specifically called the court's attention to the unlawful theory of the defendants' new counter claims, the supreme court of the state found its repose against these objections on the ground that it was not error to overrule a motion to

strike out. In the "Motion to Dismiss" at pages 25-26 the supreme court is quoted as follows:

"The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter claim. An examination of the record discloses that the pleading to which reference is here made was appellee's cross complaint as amended after the decision of this court in the case of Rooker v. Fidelity Trust Co., 185 Ind. 172.

"The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the supreme court no sufficient cross complaint or counter claim could have been written by appellants. This phase of the case need not be discussed in disposing of these motions for it is settled law that error cannot be predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading.

Woodham v. Jennings, 164 Ind. 555;

Pfau v. State ex rel. 148 Ind. 539."

A complete answer to the above comment of the court is found in the fact that these motions raised Federal questions upon the record. The same objections which the court found in the motions to strike out were found, also, in the demurrer to the complaint.

In the demurrer of the plaintiffs, that the second amended counter claim as supplemented does not state facts sufficient to constitute a cause of action, these points, as points are required by the statute to be made, appear, viz.:

"1. The second amended counter claim as supplemented is joint as to both plaintiffs and must be good as to both or bad as to both. There is no privity of contract between the plaintiffs and either of the defendants except the defendant as trustee. *It contravenes the mandate of the supreme court in this cause to admit issues in this cause which are outside of those within the terms and effect of the trust agreement and the suit for an accounting as between these plaintiffs and the trustee.* If the trustee borrowed money from Fidelity Trust Company, or any other bank or banker whomso-

ever, such transaction would not, under the trust agreement, constitute or create a privity between such bank or banker and these plaintiffs.

"2. Steps taken by The Fidelity Trust Company, in its corporate capacity proper, to fortify the title it sought to acquire, and did acquire, unlawfully, were acts done in aid of its own wrong and have no place in an accounting between the *cestui que trustants* and the trustee.

"3. The trustee and its co-plaintiff, having elected to repudiate the trust agreement and having thereby caused the *cestui que trustants* to change their situation, greatly to their loss and damage, will not be heard to declare that such act of repudiation was void and that such an election to repudiate is to be disregarded.

"4. The trustee having elected, with the aid and participation of its co-plaintiff, to repudiate the trust and having thereupon caused the plaintiffs to suffer loss and damage and to change their situation, could not in any event ask that said trust agreement be reinstated, except upon a tender that equity be done these plaintiffs. There is no tender of equity made.

Printed transcript, pp. 195-196.

In the supplemental complaint it is averred by Dora E. Rooker and William V. Rooker, "that since the bringing of this action and since the filing of the amended complaint herein, The Fidelity Trust Company in its corporate capacity proper, and The Fidelity Trust Company as trustee, wrongfully and unlawfully pursued each of the purposes and acts hereinafter more particularly set forth and by such pursuit and acts have sought to consummate and make effective the wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, but at a particular time as to which these plaintiffs bring without information are unable to state, whereby said trust company in its corporate capacity proper was designing and intending to sequester, take over and appropriate and convert as its own gain, advantage and profit, the entire property and value of said trust estate of the value, towit: $85,000 to

the wrongful and unlawful exclusion of these plaintiffs and of all the just, lawful and proper beneficiaries of said trust estate."

Then follows a recital of payments which the trust company asserted were made by it as mortgagee and without any obligation as trustee; that these payments went to judgment on foreclosure of mortgage; that thereupon the property of the trust estate was sold at sheriff's sale and title acquired by the trust company in contravention of the trust agreement and the damage of Dora E. Rooker and William V. Rooker fifteen thousand dollars in and about the defense of said actions, etc.

In a second paragraph it is averred that while the litigation was in progress and while the property of the trust estate was in the trust company, there was waste and damage to the amount of twenty-four thousand five hundred dollars, the details of which are stated.

Printed transcript, pp. 147-155.

In addition to the motion to strike out, on which the supreme court comments, and the demurrer which specially set up the contravention of the former opinion, there was a motion for judgment on the special findings of facts. As to this motion the court is quoted at page 28 of the motion to dismiss, as follows:

"The fourth error relied upon for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment on a special finding of facts is not recognized by our practice."

Absolutely to the contrary, and to meet this palpable evasion of duty by the Supreme Court of Indiana we quote the controlling statute and refer to some of the many decisions of the supreme court thereon as follows, viz.:

"Sec. 591 (574)-441. Where the verdict is special or there has been a special finding on particular questions of fact, the court shall render the proper judgment."

Sec. 591, 1 Burns R. S. 1914.

(NOTE: The numerals 591, at the head of this section

indicate the section number in the Indiana Revised Statutes of 1914. The numerals 574 indicate the number of the same section in the Indiana Revised Statutes of 1901. The numerals 441 indicate the number of the same section in the Indiana Revised Statutes of 1881. In the civil code of 1881 appear the additional numerals 351, which indicate the number of the same statute in the first civil code adopted after Indiana changed its Constitution in 1852.)

In Bell's Admx. v. Golding (1866), 27 Ind. 173, 184, the court below made a special finding of facts and the supreme court reversed the judgment and entered this mandate, viz.: "The judgment is reversed, with costs, and the cause remanded, with directions to the court below to enter a judgment for the appellant upon the special finding of facts."

(NOTE: In this case it is worth while to note the names of counsel. They include Thomas A. Hendricks, who was a governor of Indiana, a senator of the United States and its vice-president; Oscar B. Hord, a leader of the Indiana Bar; Abram W. Hendricks, recognized, even today, as the most thorough lawyer ever in Indiana; John T. Dye, long a leader of the Indiana Bar, for many years general counsel of the Big Four railroad system, and whose work has left its imprint on the record of this court; Mr. Addison C. Harris, long a leader of the Indiana Bar, embassador of the United States to Austria in the term of President McKinley. These observations may be an animadversion but they should have their effect in proving that the bar of Indiana has recognized and employed the rule of practice which in this case the supreme court denounced as "unknown.")

In this case the motion had the effect to challenge a special finding which was in contravention of the supreme court mandate under which at the time the circuit court pretended to be acting.

The rule and procedure at issue came into the Indiana code on the adoption of the Constitution of 1852, from the Chancery practice. Speaking to this point in Gale v. Grannis (1857), 9 Ind. 140, 143, Judge Perkins, for the supreme court, said: "This is an old Chancery cause, and it has

been the invariable rule of the court to make a final disposition of all such on the hearing here, instead of remanding for a new trial. The parties have respectively made their case, and put it upon record. We suppose they have made the best they could. Litigation must sometime cease. * * * The decree is reversed, with costs. Cause remanded, with instructions to the court below to enter a decree for the amount of the mortgage and interests.")

Jeffersonville, Etc. Assn. v. Fisher, 7 Ind. 699;
Gale v. Grannis, 9 Ind. 140;
Nichols v. Glover, 41 Ind. 24;
McAfee v. Reynolds, 130 Ind. 33;
Shoner v. Penna. Co., 130 Ind. 170;
Brown v. Ohio, Etc. R. Co., 138 Ind. 648;

Boardman v. Griffin (1875), 52 Ind. 101, 106-7: "The court has very clearly in the special findings, found against the plaintiff as to the case made by his complaint and we do not see why judgment should not have been rendered against him. * * * In our judgment the court should have rendered judgment on the findings for the defendants. * * * The judgment is reversed with costs, and the cause remanded, with instructions to render judgment for the defendants on the special findings."

Dixon v. Duke (1882), 85 Ind. 434, 436: "If the facts found are not sufficient to entitle a plaintiff to judgment, then the defendant's motion for judgment should be sustained unless the case is one where the defendant has the burden of proof * * * The rule is, that it is the facts, and not the evidence, which are to be considered in determining the sufficience of a special verdict. In strictness, neither a special finding nor a special verdict should contain anything except the facts, but if facts and evidence are both stated, the court will act upon the facts and not upon the evidence. (Citing cases.)"

Johnson, Admr. v. Culver, Admr. (1888), 116 Ind. 278, 280: "The questions were presented by motions for judgment on the facts found, and this was the appropriate procedure. A party who deems himself entitled to judgment on

a special verdict should move for judgment, and, if unsuccessful, preserve the question with an exception. (Citing cases.)"

Louisville, Etc. R. Co. v. Green (1889), 120 Ind. 367, p. 373: "Before the rendition of the judgment on the verdict in favor of the appellee, the appellant moved the court for judgment in its favor on the special verdict as to the cow killed on the highway crossing, and the court overruled the motion. This was a proper motion. The two causes of action were clearly distinct, and if the facts found in the special verdict entitled the appellee to a judgment in its favor upon the one cause of action, the motion should have been sustained. (Citing cases.)"

Puterbaugh v. Puterbaugh (1891), 131 Ind. 288, 299: "It is suggested, rather than asserted, that the verdict is outside of the issues, and we are referred to the cases of Boardman v. Griffin, 52 Ind. 101; Thomas v. Dale, 86 Ind. 435; Hasselman v. Carroll, 102 Ind. 153. If the assumption that the special verdict is entirely outside of the issues is correct, the appellant's motion for judgment should have been sustained. We think it clear that where the material facts stated in a special verdict are wholly outside of the issues the defendant in such case is entitled to judgment, for the plaintiff can only recover according to the allegations of his complaints. Palmer v. Chicago, Etc. R. Co., 112 Ind. 250. The question is properly presented by a motion for judgment on the verdict. (Citing cases.)"

Royse v. Bourne (1897), 149 Ind. 187, 189: "If the appellants believed they were entitled to move for judgment upon the special findings, they ought to have proceeded upon that theory."

Brunson v. Henry (1898), 152 Ind. 310. Motions for judgment on a special finding of facts were considered at length by the supreme court and the cause decided accordingly.

Ever since the enactment of the statute *supra* the rules in respect of special findings have been in Indiana.

1 To test whether a special finding is within the issues,

the procedure is with a motion for judgment on the special findings.

2. To test whether a special finding is sustained with the evidence, the procedure is with a motion for new trial, assigning that the special finding is not sustained with sufficient evidence.

3. To test whether the court properly states the conclusions of a law upon special findings which are within the issues and which are sustained with sufficient evidence, the proper procedure is to except to the conclusions of law.

Therefore it is obvious that the Supreme Court of Indiana when, in this case on the last appeal, it read out of the law and excluded from application, the well established procedure of a motion for judgment on the special findings the effect of the court's action, if not, also, its purpose and intent, was to exclude from this case and destroy the effect of the first decision. But the first decision had become the law of Indiana as to this case; it had entered into and become a part of the contract and constituted, therefore, an essential part of the obligation of that contract.

This court has held that the right to have recourse to processes of the law was an essential part of a contract and that it could not be impaired in the presence of the contract clause of the Constitution of the United States.

Bronson v. Kinzie, 1 How. 311; 11 Law Ed. 143;
McCracken v. Hayward, 2 How. 608; 11 Law Ed. 397;
Lessee of Gantly v. Ewing, 3 How. 708; 11 Law Ed. 794;
Planters Bank v. Sharp, 6 How. 301; 12 Law Ed. 447;
Curran v. Arkansas, 15 How. 304; 14 Law Ed. 705;
Hathorn v. Calif., 2 Wall 10; 17 Law Ed. 776;
United States v. Quincy, 4 Wall 535; 18 Law Ed. 403;
Christmas v. Russell, 5 Wall 290; 18 Law Ed. 475;
Clark v. Reyburn, 8 Wall 318; 19 Law Ed. 354;
Edwards v. Kearzey, 99 U. S. 595; 24 Law Ed. 793;

Brine v. Hartford Fire Ins. Co., 96 U. S. 627; 24 Law Ed. 858;
Daniels v. Tearney, 102 U. S. 415; 26 Law Ed. 187;
Seibert v. U. S., 122 U. S. 284; 30 Law Ed. 1161;
McGahey v. Virginia, 135 U. S. 662; 34 Law Ed. 304;
Barnitz v. Beverly, 163 U. S. 118; 41 Law Ed. 93;
Shapleigh v. San Angelo, 167 U. S. 648; 42 Law Ed. 310;
Bradley v. Lightcap, 195 U. S. 1; 49 Law Ed. 65.

In the first of these decisions it is held that Dora E. Rooker and William V. Rooker have a right to sue upon the trust contract. This meant a bilateral and mutual contract enforcible at law.

Rooker v. Fidelity Trust Co., 185 Ind. 172.

In the second of these decisions it is held that Dora E. Rooker and William V. Rooker have no right to sue upon the trust contract; that they have no interest in the trust estate; that any such rights as they may have as creditors are deferred until the trust shall have been closed and, it is claimed, that Dora E. Rooker and William V. Rooker were enjoined from asserting any other interest than that of a creditor. This meant a non-contract and one of those imperfect obligations which rest wholly in the conscience of the obligor and which cannot be enforced with any remedy at law. This impaired the obligation of the contract as made the law of the state on the first appeal. Both opinions are disclosed in the record opinion and thus the Federal question arises upon the record.

Remedies for the protection of rights under a contract enter into and are a part of its obligation, and as such they cannot in any degree be impaired. In *Edwards v. Kearzey*, 96 U. S. 595; 24 Law Ed. 793, Mr. Justice Swayne, speaking the opinion of this court, examined the various definitions of "obligation" and "impairment" in respect of contracts protected by the Constitution of the United States and in course of his statement of the controlling principles, said: "The obligation of a contract includes everything

within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, ceases to be and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right and want of remedy are the same thing." 1 Bac. Abe. tit. Actions in General. Letter B. * * *

"It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement.

Von Hoffman v. Quincy, 4 Wall 435; 18 Law Ed. 403.

In *Green v. Biddle*, 8 Wheat 1, 5 Law Ed. 547, this court said touching the point here under consideration: "It is no answer, that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the contract as if they overturned his rights and interests.

"One of these tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force.

Bank v. Sharp, 6 How. 301; 12 Law Ed. 447.

In *Green v. Biddle*, 8 Wheat 1, 5 Law Ed. 547, Mr. Justice Washington, speaking the opinion of this court on the rehearing of the case, at page 76, said: "A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them,

will pass a right to the land itself. Shep. Touch. 93. Co. Litt. 4. b. "For what," says Lord Coke, "is the land but the profits thereof."

Where conflicting decisions of the supreme court of a state are rendered affecting the obligation of one and the same contract, and the second opinion with an express reference thereto makes the first opinion a part of the second opinion, a Federal question arises upon the record, where it appears that the second opinion impairs the obligation of the contract as fixed with the first opinion. In such case the Federal question appears upon the record and the case is excluded from that class of cases in which the Federal right, title, privilege or immunity must have been specially set up or claimed, to give this court jurisdiction.

Martin v. Hunter's Lessee, 1 Wheat 305; 4 Law Ed. 97;

Miller v. Nichols, 4 Wheat 311; 4 Law Ed. 578;

Wilson v. Blackbird, Etc. Co., 2 Pet 245; 7 Law Ed. 412;

Satterlee v. Matthewson, 2 Pet 380; 7 Law Ed. 458;

Crowell v. Randall, 10 Pet 368; 9 Law Ed. 458;

Bridge Proprietors v. Hoboken, Etc. Co., 1 Wall 116; 17 Law Ed. 571;

Furman v. Nichol, 8 Wall 44; 19 Law Ed. 370;

Murray v. Charleston, 96 U. S. 432; 24 Law Ed. 760;

Chicago, Etc. Co. v. Needles, 113 U. S. 74; 28 Law Ed. 1084;

Eureka, Etc. Co. v. Yuba, Etc. Ct., 116 U. S. 410; 29 Law Ed. 671;

Kaukana, Etc. Co. v. Green Bay, Etc. Co., 142 U. S. 254; 35 Law Ed. 1004;

Columbia, Etc. Co. v. Columbia, Etc. Co., 172 U. S. 475; 43 Law Ed. 521;

Yazoo, Etc. R. Co. v. Adams, 180 U. S. 1; 45 Law Ed. 395.

Speaking to the point that this court will examine the record to determine whether it presents within its own terms, as distinguished from a specific declaration by coun-

sel, a Federal question which will give this court jurisdiction it was said in Bridge Proprietors v. Hoboken, Etc. Co., 68 U. S. 116; 17 Law Ed. 571, Mr. Justice Miller, speaking the judgment of the court:

"It is objected, however, by the defendants, that the pleadings do not, in words say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the specific clause of the constitution supposed to render the act invalid.

"It would be a new rule of pleading and one altogether superfluous to require a party to set out specifically the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and the defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact, without requiring the pleader to say in words: "This paragraph of the constitution is the one involved in this case."

Mr. Justice Brown, speaking for the court in Kaukana, Etc. Co. v. Green Gay, Etc. Co., 142 U. S. 254; 35 Law Ed. 1004, said: "This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court."

Wilson v. Blackbird Creek Marsh Co., 2 Pet 245;
Armstrong v. Athens County, 16 Pet 281;
Chicago L. Ins. Co. v. Needles, 113 U. S. 574;
Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct., 116 U. S. 410.

This court will examine the opinion of the state court to learn whether a Federal question appears.

Kreiger v. Shelby R. Co., 125 U. S. 39; 31 Law Ed. 675.

In Louisiana v. Jumel, 107 U. S. 711; 27 Law Ed. 448, this court held that a holder of municipal bonds based upon certain public property were *cestuis que trust* and could sue upon a maladministration of the property which constituted their security. Many cases are reviewed in the opinion and their principles reiterated.

This court will not permit an untenable opinion of the supreme court of a state, to defeat jurisdiction where the record shows that a Federal question exists.

Louisville Gas Co. v. Citizens Gaslight Co., 115 U. S. 683, 697; 29 Law Ed. 510, 515;

Terre Haute, Etc. R. Co. v. State ex rel Ketcham, 194 U. S. 579; 48 Law Ed. 1124;

Bradley v. Lightcap, 195 U. S. 1, 22-23; 49 Law Ed. 65.

This rule correlates with the principle that within its jurisdiction this court exercises an independent judgment in the determination of all questions which are not settled law.

Kuhn v. Fairmount Coal Co., 232 U. S. 349; 54 Law Ed. 229.

STATEMENT OF THE REMEDIAL LAWS OF INDIANA.

Indiana has rules of pleading practice and procedure which are remedial and therefore, under the rules of interpretation and construction which prevail in this court in contract cases, enter into and become a part of the obligation of contracts within the terms of the contract clause of the Federal Constitution and which, likewise, enter into and become a part of the due process clause of the Fourteenth Amendment, and which likewise, when excluded from their normal functions in a given case, constitute denial of the equal protection of the law.

These rules of pleading, practice and procedure find their first exposition in a classification of the nature of rights and remedies in contract cases upon default in the performance of the contract. The rules may be summarized insofar as they apply to rights of action as follows, towit:

1. There are those cases where there has occurred maturity of the contract and the default consists in the failure of the obligor to perform. These cases may be illustrated with a promissory note which passes the date of maturity without payment, and the party aggrieved is required to sue.

2. There are those cases where there has occurred a breach of an executory contract by one party without delinquency on the part of the other party. These cases may be illustrated with an executory contract for the sale of goods, with the employment of services, etc., in which cases the party charged with the duty of furnishing the goods or the services defaults or repudiates his obligations and the party aggrieved is required to sue.

3. There are those cases where there has occurred a breach of an executory contract by one party without delinquency on the part of the other party and the party delinquent, or those in privity with him, is obliged to sue.

These cases may be illustrated with contracts for public work where the contractor abandons or repudiates his engagement after having performed a material part thereof and the contract is re-let at the expense of the primary contractor and the sureties on his bond, and the primary contractor or those in privity with him is required to sue.

These rules of pleading practice and procedure find their second exposition in the trial of cases in the control of parties litigant, in the employment and control of triers of the facts and with the conduct of courts in their action upon verdicts, special findings, etc. The rules may be summarized insofar as they apply to practice and procedure as follows, towit:

1. He who has the burden of proof must recover *secundum allegata et probata*, or not at all.

2. He who is made a defendant must set up every defense he has or he will, therefore, be barred with the rules of *res adjudicata*, if he shall later attempt to institute a new suit; or he will be barred with the rule of the law of the case, if he shall attempt to amend his pleadings in a pending action after a former appeal to the supreme court of the

state. This rule is particularly stringent in cases concerning contracts; also, in cases concerning the title to real estate.

3. Upon the trial of the case, it is objectionable to offer evidence which is irrelevant and immaterial to the issues tendered with the pleadings, and it is reversible error if such evidence be admitted over objection.

4. Upon the trial of a case it is objectionable to instruct a jury upon matters which are beyond the issues or in contravention of the law of the case.

5. Upon the return of a special verdict by a jury or the making of a special finding of facts by a court, a motion for judgment on the special verdict or on the special findings of fact, is employed to test and determine whether the special verdict, by the jury, or the special finding by the court, is within the issues of the case. This rule is employed to measure the special verdict or the special findings, as the case may be, according to the standards of the case as laid down in the pleadings of the parties.

6. Upon the return of a special verdict by a jury, or the making of a special finding by the court, a motion for new trial, assigning that the special verdict or the special finding, as the case may be, is not sustained with sufficient evidence, is employed to test and determine whether the trier of the facts has departed from the material and relevant evidence.

7. Upon the making of a special finding of facts, if it be within the issues of the case and sustained with sufficient evidence, the court states conclusions of law and to these exceptions may be taken to determine whether the court has correctly applied the law upon a proper state of facts.

8. It is the rule that each of these steps shall be taken and the issues presentable thereon be made and disposed of before any subsequent step shall be admissible. Thus we have an orderly method of adjudication, towit:

(1) Does the complaint present a proper challenge?

(2) Is the challenge of the complaint properly met?

(3) Are the facts offered to be proven consistent with the issues submitted for trial?

(4) Is the result of the trial consistent with the cause submitted?

(5) Is the law as stated upon the record, consistent with the fixed standards of the law?

All these steps are separate and distinct parts of the law of Indiana and they constitute its process for the remedial determination of the rights and grievances of the people of the state. Nor can these steps be exchanged nor supplanted with one another although they are connected. Like the head and the feet of a man, they are connected and each is an essential part of the same unit. But they are not interchangeable in either position or function. They cannot be blended so as to substitute the separate functions of either for the synthetic function of the entire organism. The complaint must precede the answer, the answer must precede the joinder of issue, the joinder of issue must precede the trial, the trial must supplement the issues, the special finding must accord with (1) the issues and (2) the evidence; the law, as concluded, must be consistent with the general law upon the subject affected and the judgment of the court must be accordingly.

The judgment may intervene at any point where the step taken may be a departure from the law. The judgment may be upon the pleadings, it may be upon the statement of the case by counsel; it may be upon the evidence; it may be upon the verdict; it may be upon the conclusions of law.

The precedure thus prescribed constitutes the remedial process of the state for the enforcement of rights and the redress of wrongs. It constitutes both the essence and the method of adjudication. Its consummation is the judgment of a court of competent jurisdiction. The denial of any right to judgment is a denial of judgment. The denial of judgment strikes down the obligation of a contract in a contract case where the issues, or the law, are subjected to departure. The denial of judgment when judgment is due, impairs the obligation of an affected contract. This impair-

ment shall not be consummated without contravention of the contract clause of the Federal Constitution.

To withhold judgment when judgment is due is a denial of the due process of law and this the Fourteenth Amendment of the Federal Constitution prohibits.

To withhold judgment when judgment is due to a particular person, although in like circumstance judgment would be awarded to others, is a denial of the equal protection of the law and this cannot be consummated without contravention of the Fourteenth Amendment of the Federal Constitution.

Special findings must be within the issues. Whether the parties have got a trial of the case they submitted, is tested with a motion for judgment on the special verdict. This motion searches the record for variances between the pleadings and special findings and it is sustained against the party who has the burden of proof. The logic for this reposes in the fact that where a special verdict is silent as to material averments in a pleading the presumption of law is that the silence is due to a failure of proof. Upon such failure of proof the trial court is not permitted to write into its special finding a case other than the one submitted for trial. Until there is a lawful special finding there can be no conclusions of law to which exceptions are available.

Boardman v. Griffin, 52 Ind. 101, 106-7;
Terry v. Shively, 64 Ind. 106, 111;
Dixon v. Duke, 85 Ind. 434, 436;
Thomas v. Dale, 86 Ind. 435, 438;
Quick v. Brenner, 101 Ind. 230, 235;
Johnson v. Culver, 116 Ind. 278, 280;
Louisville v. Green, 120 Ind. 367, 373;
Puterbaugh v. Puterbaugh, 131 Ind. 288, 299;
Willis v. Crowder, 134 Ind. 515;
Citizens Bank v. Judy, 146 Ind. 322, 349;
Royse v. Bourne, 149 Ind. 187, 189;
Brunson v. Henry, 152 Ind. 310.

The motion for judgment on the special findings in this case was given at the earliest opportunity and without any

laches on the part of the plaintiff. This is all the law requires. The court could not so frame its record as to exclude the plaintiffs from the exercise of their legal rights. The statement of the conclusions of law along with the special findings was not a delinquency of the plaintiffs and it does not affect any abridgement of their rights. When the trial court presented two papers concurrently the plaintiffs had the right to their legal exceptions to each of these papers in the order of their causal effect and the taking of exceptions to one of these papers was not a waiver of the right to except to the other in due time, provided, the last exception was without any intervening action upon the matter to which the last exception was addressed. The cases cited by the Supreme Court of Indiana to sustain its ruling in this particular are not in point. In Dickson v. Rose, 87 Ind. 103, the court's own words show the irrelevancy of the case to any application here. We quote the court at page 104: "The exception to the conclusions of law stated by the court upon the facts specially found was not taken when the conclusions of law were announced and entered upon the court's docket. The next step after the entry of the finding and conclusions of law was to file a motion for new trial and having excepted to the overruling of this motion they then in open court, excepted to the conclusions of law."

In *Barner v. Bayless*, 134 Ind. 600, the intervening motions filed were not motions which challenged the relevancy of the findings to the issues. We quote the court at page 605: "There were no exceptions taken to the conclusions of law at the time they were filed. After the special finding of facts and conclusions of law thereon were filed by the court, the appellants filed a motion to make the finding of facts more specific. They also filed a motion to strike out parts of the special finding of facts, each of which motions were overruled by the court. They then filed a motion for *venire de novo* which the court also overruled. After these several motions had been ruled upon they entered an exception to the conclusion of law. This was too late."

In *Chicago, Etc. R. Co. v. State ex rel.* 159 Ind. 237,

several days intervened, and a motion to amend the special findings was presented and overruled before the exceptions were taken. We quote the court at page 241: "The special findings and conclusions of law stated thereon were announced and filed on December 15, 1900. No exceptions to the conclusions of law were taken on that day. Afterward, on December 21, 1900, appellant filed a motion to amend the special findings as set forth in said motion, which motion was overruled by the court, after which appellant excepted to each conclusion of law."

In *Medical College v. Comingore*, 140 Ind. 296, the special findings and conclusions of law were filed on September 25, 1891. Afterward, on October 1, 1891, judgment was rendered for the appellees, and thereafter the exception was taken to the conclusion of law.

If the present position of the Supreme Court of Indiana be correct, then exceptions never can be taken to conclusions of law, because the statute, in that event, would mean that the findings, the conclusions of law and the judgment were concurrent events.

The Supreme Court of Indiana devotes space to its reasons for refusing to consider the exceptions to the conclusions of law on the ground that these exceptions were not made prior to the motion for judgment on the special findings. Elsewhere we have shown that the motion for judgment had the function of searching the record to ascertain if the finding was within the issues. If there were no lawful findings, there were no conclusions of law to which exceptions could be taken.

Slight examination of the statute and the adjudications will convince one that the Supreme Court of Indiana was in error in this matter in this case. The record shows that the findings of facts and the conclusions of law were written upon one and the same paper; that they ran continuously from the first finding to the last conclusion, and that they bore but once the signature of the judge whose name is affixed to them. Tr., pp. 198-214.

The statute and the cases contemplate that the special

findings shall be separate from the conclusions of law. The affected statute reads as follows:

"Sec. 577 (560), Special Finding by Court—394. Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding except generally for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly. And whenever any issue of law or fact is submitted to the court for trial, and the judge shall take the same under advisement, the judge shall not, except in case of severe illness of himself or family, hold the same under advisement for more than sixty days; and, if the court wherein said issues arose be not then in session, he shall file his determination therein, in writing, with the papers in the case."

[NOTE: This case was submitted for trial on July 30, 1918. The trial was concluded on July 31, 1918, and taken under advisement. Tr., p. 197. The special findings of facts, the conclusions of law and the judgment thereon were all entered on December 21, 1918. Tr., p. 197.]

The cases deal with the special findings as with a verdict. Where the verdict or special finding is defective, there may be a motion for a *venire de novo*.

Ferris v. Udell, 139 Ind. 579.

"A special finding must be in writing so that an exception may be taken, and it must be filed with the clerk so that he can enter the special finding, and the exception to it, of record. And as evidence of its genuineness to the Appellate Court, it should be signed by the judge, or incorporated in a bill of exceptions signed by him. We think, when it is signed and filed, it may be regarded as one of the papers in the cause, under the reasoning and within the spirit of the examples of such given in *Matlock v. Todd*, 19 Ind. 130. The pleadings in the cause are part of the record, and they are signed by the counsel respectively.

Verdicts are signed; instructions of the court, made a part of the record, are signed; motions for new trial are signed. Signature is evidence of genuineness and authenticity."

Peoria, Etc. Co. v. Walser, 22 Ind. 73, 87.

Upon the complaint herein, the defendant could not at the second trial quiet title because the complaint shows (1) the former judgment and (2) the trust contracts in which Mrs. Rooker had an equity which could not be swept from her.

Ragsdale v. Mitchell, 97 Ind. 458.

In Indiana the rule as to *res adjudicata* is much more comprehensive in actions affecting contracts and real estate than in actions affecting personal property. The distinctions are thus stated by Judge Elliott in *Ulrich v. Drischell*, 88 Ind. 354, 359: "There is a distinction between actions to determine conflicting claims to property and actions for the recovery of personal judgments. It is quite clear that an action to quiet title requires the parties to put in issue and litigate all titles held or claimed by them at the time the action was instituted." *Green v. Glynn*, 71 Ind. 336; *Lyman v. Faris*, 53 Ind. 498. While it is true, etc. (Copy 88 Ind. 360.)

In *Ricker v. Pratt*, 48 Ind. 73, one who had purchased real estate subject to mortgages which he assumed was sued for the mortgage debt and foreclosure. The sale of land to him had been made upon fraudulent representations which he failed to set up in the foreclosure suit. The court said, as to *res judicita*, that he could not thereafter sue on the cause of fraud.

Fischli v. Fischli, (1825) 1 Blackf. 360: "For whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest."

Cox v. Pruitt (1865), 25 Ind. 90: "This question was settled in the previous decision of this court, and it is *res adjudicata*."

Comparet v. Hanna (1870), 34 Ind. 74: "It is not only that which the parties actually litigate, which is put at rest by the judgment, but also every other matter which they

might have litigated under the issues in the case. Whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case. *Fischli v. Fischli*, 1 Blackf. 360; *Athearn v. Brannan*, 8 Blackf. 440."

Some of the cases hold that the contract is merged in the judgment; that, thus, the contract and the judgment become as one, and thereafter there is no contract separate and apart from the judgment in which the contract is merged. In this view it would, of course, not be competent in one who was bound by the prior adjudication to sue upon the contract without pleading also the judgment of which the contract had become a part. His action, if any, would be to review it in some statutory manner as by petition for rehearing, or to attack it in equity as for fraud, mistake, etc.

Crosby v. Jeroloman (1831), 37 Ind. 264, 275-278.

This principle seems to be contemplated with the rule of this court in *Mason v. Eldred*, 6 Wal. 231.

In other jurisdictions the prohibition against further action on the same contract is made to contemplate also the principle that causes of action shall not be split and tried piece meal.

Secor v. Sturgis, 16 N. Y. 548.

We cite some of the cases which make exposition of this rule in Indiana:

Bates v. Spooner (1874), 45 Ind. 489;
Richmond St. R. Co. v. Reed (1882), 83 Ind. 9;
Board v. Pritchett (1882), 85 Ind. 68;
Anderson v. Kramer (1886), 93 Ind. 170;
Richardson v. Jones (1877), 58 Ind. 240;
Sauer v. Twining (1882), 81 Ind. 366;

Hays v. Carr (1882), 83 Ind. 275;
Farrar v. Clark (1884), 97 Ind. 447;
Ulrich v. Drischell (1882), 88 Ind. 354;
Elwood v. Beymer, 100 Ind. 504;
Indiana, Etc. R. Co. v. Koons, 105 Ind. 507;
Center Tp. v. Board, Etc. (1886), 110 Ind. 579;
Green v. Glynn (1880), 71 Ind. 336;
Richer v. Pratt (1874), 48 Ind. 73;
McCaffrey v. Corrigan (1874), 49 Ind. 175;
Landers v. George (1874), 49 Ind. 309;
Greenup v. Crooks (1875), 50 Ind. 410;
Griffin v. Wallace (1879), 66 Ind. 410;
Newcomb v. Wiggins (1881), 78 Ind. 306;
Ballard v. Franklin L. Ins. Co. (1881), 81 Ind. 239.

SOME EXPOSITIONS UNDER THE SECOND OPINION.

From an examination of the record it would seem that the obvious purpose of the lease to West was to get these appellants in jail for contempt of court in violating the process and orders of the court, and this obvious purpose is disclosed in the matters which had occurred prior to the appellee's petition for the order to confirm the lease. These preliminary matters involve events in the record which appear chronologically as follows:

The statement of the Supreme Court of Indiana that the legal rights of the plaintiffs in error may be disregarded because, otherwise the defendants in error would be injured, never was the law. All the motions addressed to the counter-claim pointed out the remedy available to the defendants in error of the *quantum valebat*. "And where one party to a special entire contract has not fully complied with its terms, but professing to act under it, has done for, or delivered to, the other party something of value to him which he has accepted, no action will lie on such special contract, but the party who has accepted benefits thereunder from the labor of the other will be liable on an implied promise arising from the circumstances to the extent

of the value received by him. *Lomax v. Bailey* (1846), 7 Blackf. 599; *Coe v. Smith* (1848), 1 Ind. 267, 270; *Kerstetter v. Raymond* (1858), 10 Ind. 199; *Becker v. Hecker* (1857), 9 Ind. 497."

Scholz v. Schneck, 174 Ind. 186.

After the first decision by the Supreme Court of Indiana (185 Ind. 172), which fixed the obligation of the contract, the principle of *locus poenitentia* became effective against the defendants if they desired to reinstate their rights under the trust agreement. This principle was wholly disregarded by the defendants in error. They sued upon the contract as one which they had fully performed. This was a direct impairment of the obligation of the contract as fixed on the first appeal, and this federal question arises upon the record. See authorities *supra* as to obligation of contract and federal question. As to *locus poenitentia*, see:

Union Pac. v. Durant, 95 U. S. 576; 24 Law Ed. 391;

St. Louis, Etc. R. Co. v. Terre Haute, Etc. R. Co., 145 U. S. 393; 36 Law Ed. 748;

The Eliza Lines, 199 U. S. 119; 50 Law Ed. 115;

Harriman v. Northern, Etc. Co., 197 U. S. 244; 49 Law Ed. 739.

When the Supreme Court of Indiana refused to apply the law of the case in behalf of Dora E. Rooker and William V. Rooker, it acted not only in contravention of the contract clause of the Constitution of the United States, but also denied to them the equal protection of the laws and took their property without due process of law. (Vide authorities *supra*.) Where a Supreme Court's action invades a federal right, the federal question arises upon the record. (Vide authorities *supra*.) Then, the assignment of errors in this court tendered to the Supreme Court of the state in connection with the writ of error is in time. (Vide authorities *supra*.)

Saunders v. Shaw, 244 U. S. 317; 61 Law Ed. 1163.

A JUDGMENT WITHOUT AN ADVERSARY.

Defendants in error are bound by their trial court theory, viz.: That the plaintiffs in error having parted with all their interest in the trust estate were incompetent to bring, and did not bring, the trust estate into court on their complaint. Having asked and got judgment on that theory they are concluded thereby. Their conduct in the premises was an election of remedies. An election of remedies is held to be conclusive. The rule applies to pleadings and procedure in court.

John v. Greist, 85 Ind. 503;
Mescall v. Tully, 91 Ind. 96;
Dawson v. Shirk, 102 Ind. 184, 188;
Chicago, Etc. Co. v. Bills, 104 Ind. 13;
Ikerd v. Beavers, 106 Ind. 580, 588;
Green v. Grooves, 109 Ind. 519;
Carr v. Haskett, 110 Ind. 152, 155;
Baker v. Ludlam, 118 Ind. 87;
Aetna, Etc. Co. v. Hildebrand, 137 Ind. 462;
State v. Scott, 171 Ind. 349;
Elliott's Gen. Prac., Secs. 945, 1013;
5 Lawson's Rights, Rem. and Pr. Sec. 2498.

The nominal trustee joined with its creditor, the Fidelity Trust Company, in its corporate capacity proper, as co-plaintiff in a cross complaint in an action on the trust contract to enforce a claim of the creditor against the trust estate in a cause where the trust estate was not sued; where the trust estate was without notice issued to it or served upon it as to the cross complaint on which recovery was had. The nominal trustee could not sue itself and it did not sue itself nor the trust estate. The nominal trustee could not defend itself in its own action, nor the trust estate. The trustee is a judgment plaintiff here in a judgment *in rem* against the trust estate on issues tendered against the trust estate by the nominal trustee and as to which issues the trust estate never was sued. The judgment is void. Vide authorities *supra*.

1 Burns R. S. 1914, Sec. 252;

Mitchell v. St. Mary, et al., 148 Ind. 111, 115;
Marion Bond Co. v. Mexican, Etc. Co., 160 Ind. 558, 563.

Denial of due process of law and denial of the equal protection of the law may arise upon a judicial record as it may arise otherwise. In the instant case it arises upon a judicial record. The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities.

Scott v. McNeal, 154 U. S. 34-45; 38 Law Ed. 896, 901;
Forsythe v. Hammond, 142 Ind. 519, 30 L. R. A. 583.

It was a denial of due process, and it was a denial of the equal protection of the law, and it was the impairment of the obligation of a contract after the first opinion by the Supreme Court for the trial court, without the trust estate having been sued and without any issue being tendered to that effect, to reform the trust deed so as to take from appellants the rights which they had never parted with and which they never had granted away, viz.:

A. The power coupled with an interest in their behalf to protect in any lawful manner the trust as they had created it.

B. The power coupled with an interest in their behalf to protect the trust as they had created it, and which embraced the power retained in them as grantors to appoint a new trustee for cause; and limited any power of appointment by the court to the appointment of a receiver who should sequester the trust estate and hold it *in custodia legis* while the court was engaged with determining the rights of the parties under the trust agreement at the time the litigation began.

C. The power coupled with an interest in their behalf to protect the right of possession and the use of the rents and profits of the trust estate pending the progressive execution of the trust.

D. The power coupled with an interest in their behalf to enforce the obligation that time was of the essence of trust agreement.

"Testing the case by the principle 'that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts and under circumstances repelling all presumptions of fraud, imposition or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is were the appellants entitled to relief? To which we respond decidedly in the negative.' Mr. Justice Catron in *Bank, Etc. v. Daniels*, 12 Pet. 32, 56; L. Ed. 989, 998.

Upton v. Tribilcock, 91 U. S. 50, 23 Law Ed. 206;
Lamborn v. County Commissioners, 97 U. S. 181, 185; 24 Law Ed. 926-929;
Bond v. Coats, 16 Ind. 203;
Oiler v. Gard, 23 Ind. 212, 219;
Town of Ligonier v. Ackerman, 44 Ind. 552, 568-578;
Bennett v. Ford, 47 Ind. 264-269;
Hines v. Board, 93 Ind. 266;
Parker v. Bank, 59 Ind. 189, 192-4.

"The *cestui que trust* may bring a bill or petition for removal, and the court may remove the trustees from office and appoint others in their place when there has been bad conduct, or the trustee is unfit for his office, or to prevent a threatened breach of the trust or any danger to the trust fund."

Perry on Trusts, 5th Ed., Sec. 817.

"Proceedings for the removal of trustees and the appointment of others require some time, as trustees have the right to file answers to the charge against them and to regular and full hearing; and as the *cestui que trust* are

entitled to have the fund properly protected and managed in the meantime, the court may appoint receivers."

Perry on Trusts, 5th Ed., Sec. 818.

"The *cestui que trust* is entitled to enforce the trust, not only against the trustee, but also against those who, with notice, wrongfully claim under the trustee.

Perry on Trusts, 5th Ed., Sec. 821, 822;

Zimmerman v. Makepeace, 152 Ind. 199.

"The powers of trustees under deeds of trust, and of mortgagees under mortgages with power of sale, depend entirely upon the terms of the deeds. Such powers are created by, and exist in the deeds, and of course they exist in the terms in which they are created and in no others. They are to be exercised by the trustees *in pais*. They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. Statutes in some states have regulated their execution, but such statutes do not create the powers themselves."

Perry on Trusts, 5th Ed., Sec. 602g.

In the consideration of a court of equity the *cestui que trust* is actually seized of the freehold.

Croxall v. Sherard, 5 Wall 268; 18 Law Ed. 572.

TWO JUDICIAL CAREERS.

The action of Judge Cox in going from the Supreme bench into the service of the defendants in error, to defeat a judgment in whose rendition he had participated, is beyond precedent in Indiana. No case like it can be found for citation here. In the absence of authorities on the subject we can say only that his action is *sui generis*.

The action of Judge Ewbank, trustee of the Malott estate (though at the particular date Mr. Malott was living, but now deceased), consisting of many millions of dollars and largely invested in trust companies and banks competent to act as trustee, in sitting in the Marion Circuit Court,

which clearly had no jurisdiction, where he invented the doctrine that the *cestui que trust* had no actionable interest in the trust estate, is also without perfect precedent. The nearest authority at hand appears to be those cases where negroes were entitled within the Fourteenth Amendment to have juries from which negroes were not excluded. So here Mrs. Rooker was entitled to have triers of fact from which *cestuis que trust* were not excluded. At least she was entitled to have the court not "framed" against her.

(See the address of Attorney-General Devens to this court on the retirement of Mr. Justice Swayne, January 31, 1881; see the Landis Resolution, American Bar Association, Cincinnati, 1921.)

Ex Parte Virginia, 100 U. S. 339; 25 Law Ed. 676.

The action of Judge Ewbank, trustee of the Malott estate, in sitting in the Supreme Court of Indiana in this case, where the record contained in the evidence a reference to and the substance of the judgment of Judge Ewbank in the Circuit Court, rendered in the case between these parties and relating to the subject of this controversy, has a correllation in the Federal statutes and procedure.

American, Etc. Co. v. Jacksonville, Etc. Co., 148 U. S. 372, 378; 37 Law Ed. 486, 492.

Morgan v. Dillingham, 174 U. S. 153; 43 Law Ed. 930.

Disqualified judges are prohibited from sitting in Indiana. "It is a fundamental principle that all tribunals clothed with judicial or *quasi* judicial functions shall be disinterested and unbiased in all matters brought before them. Any other rule or doctrine would be abhorrent to a natural sense of justice, and incompatible with judicial action. . *Moses v. Julian* (1863), 45 N. H. 52; 84 Am. Dec. 114 and Notes. *Tootle v. Berkley* (1899), 60 Kan. 446; 56 Pac. 755. *Pearce v. Atwood* (1816), 13 Mass. 324. * * * Next in importance to the duty of rendering a righteous judgment is that of doing it in such manner as will beget no suspicion of the fairness and integrity of the judge. This declaration has met with the approval of many

American courts. Conant's Appeal (1907), 102 Me. 477; 76 Atl. 564; 120 Am. St. 512."

Metsker v. Whitesell, 181 Ind. 126, 137, 138;
Juliana v. Slate, 167 Ind. 421;
Winters v. Coons, 130 Ind. 16;
Waterman v. Morgan, 114 Ind. 237;
Chicago, Etc. R. Co. v. Summers, 113 Ind. 10;
Fechheimer v. Washington, 77 Ind. 366;
Leonard v. Blair, 59 Ind. 510;
Joyce v. Whitney, 57 Ind. 550, 554.
Hall v. Thayer, 105 Mass. 219; 7 Am. Rep. 513;
State ex rel Hocker, 34 Fla. 25; 15 South. 581; 25 L. R. A. 114.
Oakley v. Aspinwell (1850), 3 Comst. (N. Y.) 547.

If Judge Ewbank were either interested in an interpretation of the law to benefit his trust investments with the rule that a *cestui que trust* could not sue the trustee for malfeasance, nor to redeem the trust estate on repudiation by the trustee; or if he were interested in shielding himself by so fixing the laws of the state so that the *cestuis que trust* of the Malott estate could not hereafter sue the trustee, he was so interested as to be disqualified under the statute of Indiana, which allowed Dora E. Rooker and William V. Rooker to file their affidavit for a change of venue from him at the Circuit.

1 Burns R. S., 1914, 422.

Had the proper affidavit showing Ewbank's interests, as a cause for change of judge, been filed and disregarded by the judge, his judgment would have been *coram non judice* and void.

Fechheimer v. Washington, 77 Ind. 366.

It is a misdemeanor in Indiana for a judge to participate in the practice of law. Sec. 2390, 1 Burns R. S., 1914, provides:

Sec. 2390. Whoever, being a judge of any Supreme, Appellate, Circuit, Superior or Criminal Court, directly or indirectly, practices law in any of the courts of this state, or gives counsel or advice in relation to any business in

any court, or keeps an office for the transaction of legal business, or for the purpose of giving counsel or advice in legal matters, shall, on conviction, be fined not less than twenty-five dollars, nor more than five hundred dollars."

Justice v. Lairy, 19 Ind. App. 272.

REQUEST FOR AFFIRMATIVE RELIEF AT THIS TIME.

Before concluding we direct this court's attention to the fact that a supersedeas bond has been given on this writ of error; that a copy of the writ of error for the defendants in error has duly lodged in the office of the clerk of the Supreme Court of Indiana; that the issuance of citation and all other steps as provided by law to preserve the *status quo ante* have been taken by the plaintiffs in error.

We direct attention, also, to the fact that in the Circuit Court on the last trial an injunction was entered against Dora E. Rooker and William V. Rooker, commanding them to desist from asserting any interest in the trust estate. It is within the judicial notice of this court in this cause that the defendants in error have made pretended sale of part of the trust estate; that they have dispossessed the plaintiffs in error of other parts of the trust estate; that the trust estate so disposed of is being wasted; that attempt has been made to imprison Dora E. Rooker and William V. Rooker because they asserted their interest in the trust estate and sought to submit their claims of right to this court for examination and determination. The injunction mentioned was given without bond. This court has the right to make the continuance of an injunction conditional. (*Russell v. Farley*, 105 U. S. 433; 26 Law Ed. 1060). This court has the right to make injunctions mutual; to preserve the *status quo ante* as it existed when the injunction was entered.

We ask that this court, in consideration of the business, order that the *status* which existed when the injunction was entered be restored forthwith and that the property and rights of which Dora E. Rooker and William V. Rooker

have been despoiled *pendente lite*, be forthwith restored to them; that the injunction be made mutual pending the consideration and decision of this case, the briefs upon the merits of which are now in advanced course of preparation.

CONCLUSION.

In conclusion we tender this summary, viz.: Upon the repudiation (1) of the trust agreement it became not only the right, but, as well, the duty, of Dora E. Rooker and William V. Rooker to institute this suit to redeem the trust estate and have the court with a receivership administer the trust for the benefit of all parties in interest; that an accounting should be had as to any interest of the defendants in error in the trust estate, and if any such interest should be found to exist, that a set time be fixed in which that interest should be discharged.

Rochm v. Horst, 178 U. S. 1; 44 Law Ed. 953;
The Eliza Lines, 199 U. S. 125; 50 Law Ed. 115.
Citizens, Etc. Bank v. Davisson, 229 U. S. 215; 57 Law Ed. 1153.
Central Trust Co. v. Chicago, Etc. Co., 240 U. S. 581, 591; 60 Law Ed. 811.
U. S. v. Purcell Envelope Co., 249 U. S. 313; 63 Law Ed. 620;
Kurtz v. Frank, 76 Ind. 594;
Adams v. Byerly, 123 Ind. 368.

The purpose of this suit was for an accounting and the right to redeem. This right, in the premises, the plaintiffs in error had.

Graffam v. Burgess, 117 U. S. 180; 29 Law Ed. 839.

The Constitution of the United States was a part of the obligation of this trust agreement from the date of its execution.

Rose v. Himely, 4 Cranch 241; 2 Law Ed. 608;
Tennessee v. Davis, 100 U. S. 257; 25 Law Ed. 648.

Strauder v. West Virginia, 100 U. S. 303; 25 Law Ed. 664.

In re Neagle, 135 U. S. 1; 34 Law Ed. 99.

PRAYER FOR RELIEF

Wherefore, the plaintiffs in error pray judgment, that the motion to dismiss or affirm be denied; that pending the further consideration of this cause the possession and use of the property affected be restored forthwith to the plaintiffs in error, and that an order be entered prohibiting the defendants in error from any further transgression upon the *status* of the trust estate as it existed upon the rendition of the first opinion and mandate of the Supreme Court of Indiana in this cause.

Respectfully submitted,

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Received copy of the above brief this .....day of November, 1922.

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Attorney for Defendants in Error.